IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 78-237

AQUA MEDIA, LTD. and A. M. LIQUIDATING CO.,
Petitioners,

—against—

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF COMMON LAW CERTIORARI

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Dated: August 1, 1978.

PERNAU-WALSH PRINTING CO. • 562 MISSION STREET • SAN FRANCISCO, CA 94105
A BOWNE COMPANY

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Now come Aqua Media, Ltd. and A. M. Liquidating Co. and move for leave to file the annexed petition for a writ of certiorari pursuant to the All Writs Act (28 U.S.C. §1651), directed to the United States Court of Appeals for the Ninth Circuit, to review the opinion and judgment of that court entered March 28, 1978 wherein that court affirmed the order of the United States District Court for the Central District of California dated April 27, 1977.

Reasons for granting the writ are set forth in a petition for writ of certiorari pursuant to 28 U.S.C. §1254(1) separately filed herewith.

AQUA MEDIA, LTD. and
A. M. LIQUIDATING CO.,
Petitioners.

By their attorney,
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STATEMENT

Petitioners Aqua Media, Ltd. and A. M. Liquidating Co. (sometimes referred to collectively as "Aqua Media") respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Carter, J.) entered on March 28, 1978, affirming a preliminary injunction order of the United States District Court for the Central District of California (Lydick, J.), entered on April 28, 1977.

OPINIONS BELOW AND JURISDICTION

The district court's preliminary injunction order, presently unreported, together with supporting findings of fact and conclusions of law, are attached as Appendix A. The opinion of the United States Court of Appeals for the Ninth Circuit affirming the preliminary injunction order is reported at 575 F.2d 222 and is attached as Appendix B. The judgment below was entered on March 28, 1978; petitioners-appellants' petition for rehearing was denied on May 18, 1978. This petition is filed within ninety (90) days of entry of the judgment below, tolled by the petition for rehearing, as required by 28 U.S.C. §2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §1651. The antitrust statutes relating to this petition are contained in Appendix C.

QUESTIONS PRESENTED

1. As a matter of law is rescission an available remedy for redressing violations of Section 7 of the Clayton Act?

2. May a selling corporation be joined as a party defendant for purposes of implementing an order of relief against an acquiring company where the acquisition allegedly violative of Section 7 of the Clayton Act was consummated prior to the filing of suit?

STATEMENT OF THE CASE

This antitrust case presents significant questions of first impression relating to the role of corporate sellers in actions instituted by the United States for alleged violations of Section 7 of the Clayton Act, 15 U.S.C. §18. The questions presented arose when the United States filed a civil action[1] seeking, alternatively, rescission or divestiture of a consummated corporate acquisition on the ground that both the buyer and seller violated Section 7 by virtue of their respective purchase and sale of assets.[2] Petitioners moved for dismissal, arguing that their action did not violate the law, that mandatory relief was therefore inappropriate and that they were not proper defendants, but the district court denied the motion, concluding as a matter of law that rescission was an available remedy. The district court then issued a preliminary injunction ostensibly to maintain the status quo pending trial and a final decision as to whether rescission would best restore competition. The Ninth Circuit affirmed, agreeing that rescission was a remedy which could be employed by district courts even where such relief necessarily would infringe upon the rights of third parties who were not even alleged to have violated any law in connection with the underlying acquisition.

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[1]Statutory authority for federal jurisdiction in the district court is found in Section 15 of the Clayton Act, 15 U.S.C. §25.

[2]Later the government conceded in both the district court and Court of Appeals that the sellers, petitioners here, did *not* violate Section 7 although the government continued to assert that petitioners were nevertheless proper parties.

The Parties

Commencing in 1967 Aqua Media, Inc. (now known as A. M. Liquidating Co.) engaged in the business of providing pure water to industrial users in California, various other states and certain foreign countries ("service business"). In 1972 it began to manufacture systems and equipment for sale internationally to customers whose businesses required purified water ("manufacturing business"). Then, in early 1976, for reasons set forth below, the company adopted a plan of complete liquidation pursuant to which it sold its California service business[3] to Arrowhead Puritas Waters, Inc. ("Arrowhead"), a wholly-owned subsidiary of Coca-Cola Bottling Company of Los Angeles ("CCLA"), for $4,750,000. CCLA and Arrowhead, together with petitioners, were named as defendants in the action which was filed in district court.

Petitioner Aqua Media, Ltd. is a California limited partnership formed by shareholders owning approximately 54% of the outstanding stock of Aqua Media, Inc. On the date following sale of Aqua Media, Inc.'s California service business to Arrowhead, Aqua Media, Ltd. purchased the residual assets of Aqua Media, Inc. (the manufacturing business and certain service business assets located outside California) for $405,000. Aqua Media, Inc. then changed its name to A. M. Liquidating Co. and began liquidation and preparation for eventual dissolution.

[3]The intrastate nature of this transaction raises a serious question as to the applicability of Clayton Act §7. However, the absence of a full factual record precludes presentation of that issue in this petition.

The Acquisition

In early 1976 representatives of Arrowhead expressed an interest in acquiring Aqua Media's California industrial water service business and related assets for cash. It was contemplated that Aqua Media would retain its name and associated good will, its manufacturing business, its interests in partnerships doing business in other states, and its wholly-owned subsidiary, Aqua Media International.

The expressed interest of Arrowhead prompted the Board of Directors of Aqua Media, Inc. to review the historical development of the company, the present state of the marketplace, and prospects for future growth. The Board noted that the company's primary business had been the sale of purified water to industrial users within California but that the California market for industrially purified water appeared finite and had remained essentially static for three years. The Board and management wished to expand into growing national and international markets through the manufacture and sale of systems and equipment as opposed to the furnishing of industrially treated water itself. However, the company lacked sufficient working capital both to maintain its position in the California service market and expand into the national and international markets. Consequently, Aqua Media entered into negotiations with Arrowhead for sale of its California service business and related assets.

On July 20, 1976 Aqua Media, Inc. and Arrowhead executed an asset purchase agreement whereby Arrow-

head agreed to acquire the California service business of Aqua Media, Inc. The contract was entered into pursuant to a plan of complete liquidation designed to meet the requirements of Internal Revenue Code §337 in order that the sale would be essentially tax free at the corporate level. The remaining assets and business of the company not being sold to Arrowhead (the manufacturing business and service business outside California) were to be sold to a newly created limited partnership (which came to be known as Aqua Media, Ltd.) in which every Aqua Media shareholder would have the right to participate.

Aqua Media, Inc.'s shareholders approved a plan of liquidation which called for dispersal of the net cash proceeds from sale of the company's assets in the form of liquidating distributions to its 27 shareholders. The first distribution was scheduled to be made "prior to December 31, 1976," and the second during early 1977. (C.T. 35).[4]

The acquisition agreement was closed on August 2, 1976. At that time Arrowhead paid $2,750,000 in cash and delivered two promissory notes aggregating $2,000,000 payable February 28, 1977. Aqua Media delivered appropriate documents passing clear title

[4]References "C.T. ....." are to the Clerk's Transcript and references "R.T. ....." are to the Reporter's Transcript, which, together with certain exhibits transmitted in separate envelopes to the Clerk of the Court of Appeals, comprise the Record on Appeal.

to the assets sold. Arrowhead took physical possession of the assets.[5]

On August 3, 1976, Aqua Media, Inc. sold its residual assets to the newly created limited partnership known as Aqua Media, Ltd., for $405,000. The corporation then changed its name to A. M. Liquidating Co. and began payment of liquidating distributions to its shareholders. At the time this suit was filed, those distributions totalled $2,091,000. The Antitrust Division of the U. S. Department of Justice did not advise Aqua Media that it was contemplating filing suit challenging the validity of the acquisition until after those distributions were made. (C.T. 49-52).

Procedural History

The complaint (C.T. 332-340) filed by the Department of Justice on December 23, 1976 named both the buyers (CCLA and Arrowhead) and the sellers (A. M. Liquidating Co. and Aqua Media, Ltd.) as defendants. It alleges that the acquisition by Arrowhead of Aqua Media's California service assets and business violated Section 7 of the Clayton Act and prays for divestiture or rescission as alternative remedies "to prevent and restrain the continuing violation by the defendants . . . of Section 7 of the Clayton Act (15 U.S.C. §18)."

[5]The parties also agreed that Arrowhead would temporarily operate certain services for Aqua Media's service business in Arizona, New Mexico, Texas and the Pacific Northwest, and that Arrowhead would serve as Aqua Media's exclusive distributor of its systems and equipment in California for a limited period of time. These ancillary agreements, since terminated by the parties, are not relevant to the instant petition.

The complaint does *not* attack the sale by Aqua Media, Inc. of its manufacturing business assets and non-California service business assets to Aqua Media, Ltd.

Petitioners promptly moved alternatively for dismissal, summary judgment or an order striking the prayer for rescission, contending that, as a matter of law, rescission was not an available remedy in Section 7 cases and, alternatively, that rescission was not available as a matter of law given the particular factual circumstances of this case, *i.e.*, that the transaction was fully consummated prior to commencement of the action, that approximately 60% of the net cash proceeds of sale had already been distributed to the shareholders of A. M. Liquidating Co., and that the shareholders were not parties to the action. On February 7, 1977 the district court denied those motions.

The government immediately moved for a preliminary injunction to preclude distribution of the remaining proceeds of sale to the shareholders. On March 14, 1977 the district court granted the government's motion although acknowledging that "sellers are not liable under the Clayton Act." (R.T. 102-103). The court concluded that the "argument that rescission here is not available is inconclusive, and the court retains that option. A preliminary injunction, in our view, is necessary to maintain the status quo."[6]

The preliminary injunction order, entered on April 28, 1977 (C.T. 646), enjoins execution of the plan of

[6]See Appendix B7.

liquidation, precludes distribution to the shareholders of the remaining proceeds of sale, and, despite the fact that Aqua Media, Ltd. was not a party to the original sale, restrains that entity from making any distributions to its partners, from selling assets of the partnership, from terminating the partnership, and from altering or amending the partnership agreement.

Following entry of the preliminary injunction order, petitioners ascertained through discovery that the government based its contention that rescission was an appropriate form of relief upon a conclusion that the contract by which Arrowhead agreed to acquire the Aqua Media assets was illegal. Petitioners thereupon moved to dissolve the preliminary injunction arguing both that the contract was not illegal and that the alleged illegality was not a recognized ground for rescission either in the abstract or in this case. The district court on July 18, 1977 denied petitioners' motion.

Timely appeal was taken and the Ninth Circuit agreed to expedite its review. The opinion of the court of appeals concedes that its ruling is one of "first impression in the federal circuit courts" and acknowledges that this Court's decision in *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316 (1961) leaves the question of availability of the remedy of rescission in Clayton Act §7 cases "an open question." 575 F.2d at 229 n. 7. The Ninth Circuit held that a rescission order may be entered against a corporate seller which has not violated the Clayton Act or any other law.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The role of the corporate seller in cases brought under Section 7 of the Clayton Act has never been addressed by this Court. The question of whether rescission is an available remedy for redressing violations of Section 7 by the acquiring company, and the related question of whether a seller may be retained as a defendant for the purpose of implementing a relief order against an acquiring company even where the acquisition involved was consummated prior to the filing of suit, rightfully deserve this Court's attention.

The court of appeals acknowledged that in answering these questions it was faced with a case of first impression. In support of its holding that rescission can be ordered where a violation of Section 7 is found, the Ninth Circuit relied upon (1) inapposite decisions which dealt with the propriety of awards of relief against parties who had violated the law, (2) a mistaken understanding of the congressional history of the Clayton Act, and (3) an interpretation of the provisions of that act which ignores accepted rules of statutory construction.

Section 7 of the Clayton Act is undoubtedly one of the most significant provisions of this nation's antitrust laws. Review of the decision rendered by the court of appeals is appropriate in order to settle an important question of federal law which has not been, but should be, resolved by this Court.

SECTION 7 OF THE CLAYTON ACT ONLY PROSCRIBES ACQUISITIONS

Section 7 of the Clayton Act provides, in relevant part:

> "*No corporation* engaged in commerce *shall acquire,* directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or *any part of the assets of another corporation* engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C. §18) [Emphasis added]

The activities of the seller (acquired) corporation are not prohibited by any language in Section 7. Only a few reported decisions have construed the role of corporate sellers under Section 7, but they uniformly hold that it is aimed at the acts of the purchaser rather than those of the seller.

Only one court of appeals decision has addressed the question of possible seller liability in Section 7 cases although it did so in the context of a private treble damage action. In *Dailey v. Quality School Plan,* 380 F.2d 484 (5th Cir. 1967) the Fifth Circuit held that a seller's actions are not proscribed by Section 7, stating:

> "This leaves one question. [Seller] contends that the complaint should be dismissed as to it insofar as the cause of action against it rests on Section 7 of the Clayton Act. The argument is that Section 7 is directed against the acquiring corpora-

> tion and not against the seller. This position is well taken. Section 7 by its terms proscribes only the acquiring corporation. There seems to be no decision to this effect but the language of the statute is clear. We thus affirm the dismissal as to [seller] on the Section 7 charge."

380 F.2d at 488.

The Ninth Circuit adopted the reasoning of *Dailey* in *McGuire v. Columbia Broadcasting Company, Inc.*, 399 F.2d 902 (9th Cir. 1968) in which it was called upon to construe analogous language in Section 3 of the Clayton Act.[7] Instead of focusing upon the liability of a purchaser, as is the case with Section 7, the proscription in Section 3 is upon the seller. In affirming summary judgment in *McGuire* the Ninth Circuit held:

> "The language of the statute defines liability in terms of a person who makes a sale or contracts for sale and nowhere provides for liability of the buyer. *Here, General Foods is not the seller, and consequently no cause of action is created against it.* While no case which holds to this effect has been drawn to our attention, the language in the statute seems plain. A similar interpretation of Section 7 of the Clayton Act (15 U.S.C. §18) was made in Dailey v. Quality School Plan, 380 F.2d 44 (5th Cir. 1967) where the court held that Section 7 forbidding certain acquisitions applied only

[7]Section 3 provides in relevant part:
"It shall be *unlawful* for any person . . . *to make a sale* . . . of goods, wares, merchandise, machinery, supplies or other commodities . . . where the effect of such . . . sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [Emphasis added.] 15 U.S.C. §14.

> to an acquiring corporation and not to the corporation being acquired." [Emphasis added].

399 F.2d at 906.

The Federal Trade Commission has also held that Section 7 has no application to corporate sellers. In its decision in *In The Matter of Dean Foods, et al.*, 70 F.T.C. 1146 (1966), the commission stated that "it is clear under the language of [Section 7] that the Clayton Act prohibition was directed solely against the acquiring company and did not encompass the activities of the acquired company," and then proceeded to dismiss the Section 7 claim against the selling company. *Id.* at 1290. However, because the activities of the seller were found by the commission to constitute an "unfair trade practice" in violation of Section 5 of the F.T.C. Act, which was separately charged, the Commission retained the seller as a defendant to the Section 5 claim.

Other district courts have reached similar conclusions regarding the inapplicability of Section 7 to sellers.[8] See *U.S. v. Parker-Hannifin Corp.*, 1974 Trade Cas., ¶75,061 (C.D. Cal. 1974); *Record Club of America, Inc. v. Capitol Records, Inc.*, 1971 Trade Cas., ¶73,694 (S.D.N.Y. 1971).

A seemingly contrary result was reached in *United States v. Pabst Brewing Co.*, 183 F.Supp. 220 (E.D. Wis. 1960) where the district court held that an

[8]In *United States v. Reed Roller Bit Company*, 274 F.Supp. 573 (W.D. Okla. 1967) the court was presented with a request for rescission but found it "unnecessary" to decide the question. 274 F.Supp. at 590.

award of relief against a seller might be appropriate. Upon analysis, however, *Pabst* is distinguishable from *Dailey* and cases following it for in *Pabst* the sellers closed the acquisition in spite of knowledge that the Department of Justice intended to challenge the acquisition under Section 7. *Pabst* is further distinguishable on the grounds that a close continuing connection remained between buyer and seller subsequent to closing by the virtue of the seller's stock ownership in the acquiring company.

This Court has never before been called upon to decide the propriety of awards of relief against (or orders dismissing) sellers. In *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 529 n.9 (1973), the Court merely noted in passing that the seller had been dismissed. In the one decision touching on the issue, *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316 (1961), this Court reversed a district court ruling denying the government's request for complete divestiture by duPont of its General Motors stock, in the process stating that upon remand:

> "General Motors, Christiana, and Delaware [sellers] will thus be able to renew, for the district court's decision in the first instance, any objections they may have to the power of the court to grant relief against them." 366 U.S. at 334-335.

Consequently, as noted by the court of appeals below, this Court has never ruled upon the applicability of Section 7 to a seller or upon the extent to which a seller may be embroiled in litigation in-

volving the government and an acquiring company,[9] and petitioners submit that a writ of certiorari should issue to settle the important questions of federal law presented here.

NEITHER THE LANGUAGE OF SECTION 15 OF THE CLAYTON ACT, THE LEGISLATIVE HISTORY OF THE CLAYTON ACT, NOR THE EQUITABLE POWERS OF THE COURT PERMIT RESCISSION OF A CONSUMMATED ACQUISITION

The court below concluded that the language of the Clayton Act, that Act's legislative history and the broad equitable powers of federal courts all support its conclusion that rescission is an available remedy for violations of Section 7 of the Clayton Act. Upon analysis, however, none of these three touchstones of the Ninth Circuit opinion supports its conclusion.

A. The Language of Sections 7 and 15 of the Clayton Act Does Not Support The Court's Conclusion

Two portions of the language of Section 15 of the Clayton Act were singled out for analysis in the Ninth Circuit's opinion. The first of these was that portion of Section 15 which empowers courts to "prevent and restrain" violations of the act. The second was the portion of Section 15 which provides that:

> "Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may

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[9] In the one prior instance where the question was squarely presented, this Court declined to rule on jurisdictional grounds. *Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972) (interlocutory appeal barred by Expediting Act).

cause them to be summoned, whether they reside in the district in which the court is held or not. . . ."

Each of these sections must be construed in accord with basic principles of statutory construction which require that statutes which are *in pari materia* be construed together. *Sanford v. Commissioner of Internal Revenue,* 308 U.S. 39 (1939); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, §51.01 *et seq.* (4th Ed. 1973) [hereinafter SUTHERLAND]. Such a mode of interpretation gives effect to all provisions of both statutes and ensures development of an harmonious interpretation of statutes which were intended to be read together. *Rawls v. United States,* 331 F.2d 21 (8th Cir. 1964); *Northern Natural Gas Company v. Grounds,* 441 F.2d 704 (10th Cir. 1971); SUTHERLAND, *supra,* at §51.02. When, in construing statutes *in pari materia* together, the court concludes that a conflict exists between the language of two provisions, the specific substantive statute must control over more general remedial provisions absent expression of any contrary Congressional intent. *Preiser v. Rodriguez,* 411 U.S. 475 (1973); *Abell v. United States,* 518 F.2d 1369 (Ct. Cl. 1975); *United States v. Fixico,* 115 F.2d 389 (10th Cir. 1940); SUTHERLAND, *supra,* at §51.05.

In accord with these rules Sections 7 and 15 of the Clayton Act must be construed together for they

are clearly *in pari materia* since Section 15 establishes the framework for redressing violations of Section 7.[10] To the extent that the language of Section 15 is susceptible of an interpretation which would make the provisions of Section 15 broader than the provisions of Section 7, the more specific substantive language of Section 7 must control.

A review of the Ninth Circuit's opinion requires the conclusion that that court erred in applying the rules of sound statutory construction set out above for after conceding that Section 7 does not prohibit the activities of a seller the Ninth Circuit went on to conclude that Section 15, which merely provides the statutory basis for redressing violations of Section 7, authorizes the award of relief against sellers. Each of the portions of Section 15 upon which the Court relied to support its decision must be read consistently with Section 7. Neither can be read to provide a remedy where Section 7 finds no wrong.

B. Congressional History of the Antitrust Laws Demonstrates That Section 15 Was Not Intended to Allow Punishment of Individuals Who Have Not Violated The Law

In concluding that rescission might be an appropriate remedy in an action brought pursuant to Section 7 of the Clayton Act the Court below relied in part upon that portion of Section 15 of the Clayton Act which provides that:

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[10]Statutes are considered to be *in pari materia* when they relate to the same person or thing or have the same object. *United States v. Freeling,* 31 F.R.D. 540 (S.D.N.Y. (1962); *Willapoint Oysters v. Ewing,* 174 F.2d 676 (9th Cir. 1949).

> "Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not . . ."

The Ninth Circuit read this portion of Section 15 as evidencing a congressional conclusion "that on occasions third parties whose conduct is not specifically addressed by the Clayton Act would be so related to the anticompetitive effects at which the act was directed that their presence would be necessary in order to fashion complete relief." 575 F.2d at 228. Having thus concluded that one of the remedial sections of the Clayton Act was intended to reach the activities of parties whose actions are not prohibited by the substantive portions of the statute, the court went on to decide that rescission is an appropriate remedy where a violation of Section 7 has occurred. The court of appeals' conclusion is based upon an inaccurate reading of congressional intent in adopting the above-quoted portion of Section 15.

As first reported by the House Committee on the Judiciary in 1914, Section 15 of the Clayton Act contained the precise language set out above H.R. Rep. No. 627, 63d Cong., 2d Sess. 4 (1914). The drafters of Section 15 adopted this language verbatim from Section 5 of the Sherman Act (15 U.S.C. §5) which was originally enacted in July of 1890. The subject portion of Section 15 is not analyzed

in the Congressional Record. However, the reasons for adoption of Sherman Act Section 5 were discussed in detail by the 51st Congress which first enacted it. According to proponents of the bill this particular language was intended to cure two problems:

1. It was intended to allow nationwide service of process so that all members of a "trust" might be made defendants in a single action. Section 737 of the Revised Statutes at that time precluded such a complete adjudication by providing that a defendant could be sued only where he resided or was found.

§1 Cong. Rec. 2640-2642 (1889).[11]

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[11]Pertinent portions of the Congressional Record read as follows:

> "Mr. Spooner [proponent of the amendment to the Sherman Act which became Section 5]: Mr. President, I offer this amendment to cure what seems to be a very great defect in the bill. Most if not all of the combinations, however they may be called, aimed at by the bill, are detrimental to the public interest. . . . Manifestly, to deal with the trust or combination of [the magnitude of the Sugar Trusts made up of 17 different corporations] it must be possible to bring into one action, into one court, the essential parties defendant. One of the arguments made by the Senator from Ohio in favor of this bill was that there might be under its provisions such a concentration of defendants; but as the law stands today there could be none, and I desire to call the attention of the Senate for a moment to the sections of the Revised Statutes bearing upon the subject. Section 737 provides:
>
> 'SEC. 737. When there are several defendants in any suit at law or in equity, and one or more are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to trial on the adjudication of the suit between the parties who are properly before it; but the judgment or the decree rendered therein shall not conclude or prejudice other parties

2. It was intended to empower courts before which antitrust suits were brought to enforce their judgments through writs of injunction which could be served outside of the jurisdiction of the court. As the propounder of the language

not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.'

Whoever may be parties defendant in the action, under that section the court might proceed as to those within the jurisdiction; but its judgment could have no effect whatsoever upon those not served or not voluntarily appearing.

Section 738 provides:

'SEC. 738. When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought . . .'

And it was amended so as to include suits brought to remove a cloud upon title to land in a district—

'is not an inhabitant nor found within said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill at a certain day, therein to be designated.'

Then follows a provision for obtaining jurisdiction in a mode to be pointed out by the order of publication or otherwise:

'But the said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only'

Then comes this section to which I call the attention of the Senator from Ohio:

'SEC. 739. Except in the cases provided in the next three sections, no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and except in said cases and cases provided by the preceding sections, no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant or in which he is found at the time of serving of the writ.'

"One object of the amendment is to provide that the Court may bring in these parties wherever they reside or wherever they are doing business and have as full and complete jurisdiction over them upon publication as if they voluntarily appeared in this action."

Cong. Rec., *supra,* at 2640.

which became Section 5 stated, "as the law stands today that writ cannot be made effective except where it is served within the jurisdiction of the court. . . ."[12]

A review of the Congressional history of Section 5 can lead only to the conclusion that that portion of the statute which reads

> "Whenever it shall appear to the court . . . that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned . . ."

was intended *only* to extend the geographical reach of the district court's power so as to enable a single court to resolve all issues related to each violation of the antitrust laws, and to allow that same court to enjoin activities found violative of the antitrust laws even if those activities occurred outside the court's physical jurisdiction. Sherman Act Section 5 did not increase the number of parties against whom relief could be awarded—it merely decreased the number of actions which would be necessary to obtain total relief.

[12]Pertinent portions of the Congressional Record provide:

"Mr. Spooner: . . . Another matter which is covered by the amendment is this. For myself, I think the efficacious remedy will be found to be, not the criminal prosecution provided for by the Senator from Texas . . . but the vigorous and drastic use of the writ of injunction. Under the law as it stands today that writ can only be served and punishment for its disobedience enforced within the district over which the court has jurisdiction. By the amendment which I have sent to the desk this writ of injunction may be served anywhere within the United States, and if it is disobeyed the attachment for contempt may be served anywhere within the United States. I think the amendment ought to be adopted."

Id. at 2642.

As discussed above, the language of Section 5 of the Sherman Act was adopted in toto as a portion of Clayton Act Section 15. The Congressional Record contains no discussion of the reasons for inclusion of this language in Section 15. However, commonly applied rules of statutory construction require that statutes dealing with the same subject matter (here the antitrust laws), particularly where they contain identical language, should be construed consistently. *Allen v. Grand Cent. Aircraft Company,* 347 U.S. 535 (1954); *Sanford v. Commissioner of Internal Revenue,* 308 U.S. 39 (1939). Thus, the subject language of Section 15 can only be read as an extension of the jurisdictional reach of courts enforcing the antitrust laws. Petitioners submit that the court of appeals erred in construing this key language as *carte blanche* authority to summon innocent third parties before district courts.

C. Equitable Powers of the Court Do Not Authorize The Remedy Awarded

The opinion rendered by the court of appeals contains numerous references to the breadth of the inherent power of a court of equity to design flexible decrees adequate to restore competition. Petitioners do not take issue with the proposition that equity's powers are broad and flexible. However, it does not follow from the premise that equity has broad inherent power to fashion decrees that equity may award affirmative injunctive relief against a party who has

not even violated the law.[13] To hold otherwise, particularly in actions based upon statute, would be to allow equity to usurp the power possessed solely by Congress for such a holding would allow a court of equity to create a remedy which is outside the authority of the law. *Rees v. City of Watertown,* 86 U.S. 107 (1873); *Whittacker & Company v. Sewer Improvement Dist. No. 1 of Dardanelle, Ark.,* 221 F.2d 649 (8th Cir. 1955); *Heine v. Board of Levee Commissioners,* 86 U.S. 655 (1874).

The court below in creating a remedy directed at a party whose activities did not violate the law went beyond even the broad powers of a court of equity. Rather than fashioning an effective remedy against a party whose activities had been condemned by Congress, the court ordered a party which has committed no wrong to repurchase a business which it no longer wishes to own, to compete in a market from which it intentionally departed, and to invest its human and financial resources in a manner contrary to its independent best business judgment. Creation of such a "remedy" can be considered as nothing less than judicial legislation.

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[13]Petitioners do not argue that the full extent of equity's inherent power should not be utilized in redressing violations of the Clayton Act. Prior decisions of this court have fashioned divestiture as a remedy for redressing violations of Section 7 by acquiring companies, *United States v. E. I. duPont de Nemours & Co.,* 353 U.S. 586 (1957), and have held that additional relief ancillary to divestiture may be appropriate. *Ford Motor Company v. United States,* 405 U.S. 562 (1972). Petitioners merely assert that even the far reaching powers of courts of equity are subject to certain limitations which the court below exceeded. *United States v. Smelser,* 87 F.2d 799 (5th Cir. 1937).

SELLERS ARE NOT PROPER PARTIES TO A SECTION 7 CASE WHERE THE ACQUISITION WAS CONSUMMATED PRIOR TO THE FILING OF THE SUIT

The court of appeals recognized that petitioners here, and sellers in general, do not violate Clayton Act §7 but held that Clayton Act §15 was sufficiently encompassing to permit joinder of third parties in Section 7 cases and authorize broad relief against third parties.

In the court of appeals petitioners conceded, based upon a line of district court decisions, that a district court is empowered to enjoin sellers (as well as buyers) from *completing* an asset sale where the government establishes the reasonable probability that the acquisition might violate Section 7. *United States v. Chrysler Corp.*, 232 F.Supp. 651 (D.N.J. 1964); *United States v. Ingersoll-Rand Co.*, 218 F.Supp. 530 (W.D. Pa.) *aff'd.* 320 F.2d 509 (3d Cir. 1963). However, petitioners noted that in this case the government did not seek to enjoin the transaction prior to its consummation and that, based upon a literal reading of Section 15, any violation resulting from the acquisition could no longer be "prevented" or "restrained." The court of appeals' response to this argument was that it "strains the normal meaning of the terms 'prevent' and 'restrain' far out of perspective," 575 F.2d at 230. That response is without analytical support. *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), upon which the court of appeals relied, is inapposite inasmuch as it sought only to construe the scope of the equity powers of federal courts to award relief against a law violator. See

also *United States v. E. I. duPont de Nemours & Co.*, 366 U.S. 316, 334-335 (1961). The legislative history of Section 15 discussed above, reveals no intent to proscribe the actions of sellers or to permit their joinder. Reference to the only stated Congressional intent relating to the statutory language in question requires the conclusion that the "short answer" offered by the court of appeals is itself short of the mark. Decisions such as *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957), regarding the extent to which district courts may order necessary and appropriate relief to eliminate the effects of acquisitions found violative of Clayton Act §7, do not address the fundamental question of the extent to which third party sellers may be summoned before district courts and subjected to prejudicial relief orders.

Petitioners submit that where a complaint fails as a matter of law to state a claim for relief against a party, that party is entitled to dismissal. *Yuba Consol. Gold Fields v. Kilkeary*, 206 F.2d 884 (9th Cir. 1953); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *Conley v. Gibson*, 355 U.S. 41 (1957). In retaining corporate sellers as defendants in Section 7 cases filed subsequent to consummation of the acquisition district courts assume jurisdiction over sellers where there is no pending "case or controversy" within the meaning of Article III of the United States Constitution. *Muskrat v. United States*, 219 U.S. 346 (1911); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923); *Massachusetts v. Missouri*, 308 U.S. 1 (1939).

While it is true that some district court decisions have held sellers to be proper parties in Section 7 cases, *United States v. Pabst Brewing Co.,* 183 F.Supp 220 (E.D. Wis. 1960); *United States v. Phillips Petroleum Co.,* 1972 Trade Cases ¶73,899 (C.D. Cal. 1971);[14] none has analyzed Section 15 or examined its Congressional history. Neither have they offered any explanation for arriving at the conclusion that sellers ought to be retained as defendants. In light of the limited but clear Congressional history pointing to a legislative intent to address only the necessity for nationwide service of process, together with the absence of any legislative intent which would support broad construction of Section 15, petitioners urge that this Court also review denial of their motion for dismissal. Courts of appeals and the Supreme Court may dismiss actions which fail to state a claim upon which relief may be granted,[15]

[14]The *Phillips* decision later reached this Court but in *Tidewater Oil Company v. United States,* 409 U.S. 151 (1972) the Court declined to decide issues relating to the seller's role on the ground review was when precluded by the Expediting Act.

[15]The parties have stipulated to entry of a consent Final Judgment in district court, the terms of which are set forth verbatim in Appendix D. As of the date this petition was filed, the proposed Judgment is still subject to provisions of the Antitrust Penalties and Procedures Act, 15 U.S.C. §16(b)-(h) and has not been approved by the district court. Even if approved, however, the issues presented here are not moot as Paragraph XXIII(B) of the proposed judgment (Appendix D23) expressly provides that a further hearing (trial) may be held to determine whether rescission of the acquisition should be ordered. It is clear that interlocutory appeal of an equity case brings the entire case before the reviewing court and that where "insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated." *Deckert v. Independence Shares Corp., supra* at 287; *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 52-53 (1938).

Deckert v. Independence Shares Corp., supra; Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973); *Aerojet-General Corp. v. American Arbitration Assn.,* 478 F.2d 248 (9th Cir. 1973); *Hurwitz v. Directors Guild of America, Inc.,* 364 F.2d 67 (2d Cir. 1966), *cert. denied* 385 U.S. 971 (1966), and petitioners should be ordered dismissed.

CONCLUSION

For the foregoing reasons this Court should issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Dated: August 1, 1978.

(Appendices Follow)

Appendices

Appendix A

United States District Court
Central District of California

Civil No. 76-3988-LTL

United States of America,
Plaintiff,
vs.
Coca-Cola Bottling Company of Los Angeles; Arrowhead Puritas Waters, Inc.; Aqua Media, Ltd.; and A. M. Liquidating Co.,
Defendants.

[Filed April 27, 1977]
[Entered April 28, 1977]

PRELIMINARY INJUNCTION ORDER

Whereas, plaintiff has moved for a preliminary injunction, and

Whereas, it appears reasonably probable that plaintiff will prevail at trial on the merits, and

Whereas, the Court may find it necessary after trial to order rescission of the Asset Purchase Agreement dated July 20, 1976, and ancillary agreements among the defendants in order to secure effective and expeditious relief, and

Whereas, the parties have been heard and the Court has made findings of fact and conclusions of law, and good cause appearing,

It Is Hereby Ordered That:

1. The plan of complete liquidation of A. M. Liquidating Co. is enjoined from execution, except that A. M. Liquidating Co. (hereinafter "A. M.") may distribute all of its property and assets subject to all of its liabilities, to The Bank of California, National Association, as trustee, to be held, administered and distributed pursuant to the terms and conditions of the A. M. Liquidating Trust Agreement dated April 19, 1977 (hereinafter the "Trust Agreement"). A. M., its officers, directors, employees, successors and assigns and all other persons acting on behalf of any of them, are each enjoined from otherwise effecting any dissolution or termination of, or selling, disposing of or diminishing any asset of, A.M.; and from doing any other act which would in any way impair the ability of A. M. to comply with any final order of this Court implementing the relief prayed for by the Plaintiff in the complaint.

2. A. M. is ordered promptly to provide to the Plaintiff copies of the lists of assets and liabilities designated as Exhibits A and B to the Trust Agreement, and shall promptly notify Plaintiff of the nature and location of any later discovered asset or liability, pursuant to paragraph 1.1 of said Trust Agreement. A. M. is further ordered promptly to provide to Plaintiff copies of all correspondence between it and the Trustee of said Trust. A. M. is further ordered promptly to advise the Court, *in camera,* as to the manner of apportionment of attorney's fees and costs of litigation between A. M. and Aqua Media, Ltd.

3. A. M. is enjoined from taking any action to alter or amend the Trust Agreement except upon further order of this Court or upon the entry of a final order from which no appeal could be taken terminating this action.

4. Aqua Media, Ltd., its general and limited partners, employees, successors and assigns and all other persons acting on behalf of any of them, are each enjoined and restrained from performance of the following acts:

a) Making any distributions to the partners, including any that are provided for by paragraph 17 of the Agreement of Limited Partnership of Aqua Media, Ltd. dated August 1, 1976 (hereinafter the "Partnership Agreement"), a copy of which is attached hereto marked Exhibit A.

b) Making any distribution of all or any part of the credit balance of any partner's capital account, including any distribution pursuant to paragraph 7 of the Partnership Agreement (Exhibit A, p. 6).

c) Making distribution of profits to the partners, including any distribution pursuant to paragraph 6 or paragraph 8 of the partnership agreement (Exhibit A, pp. 6-7).

d) Undertaking or permitting any act or omission in breach of any of the covenants, terms or conditions of the Partnership Agreement (Exhibit A).

e) Undertaking any act or vote authorizing or effecting the expulsion or removal of a general partner, termination of the partnership, the sale of all or substantially all of the assets of the partnership, or altering or amending the partnership agreement including any act or vote pursuant to paragraph 12 or 13 of the Partnership Agreement (Exhibit A, pp. 8-9).

5. Aqua Media, Ltd., is further ordered to give written notice to the Court and the Plaintiff of any of the following acts or events:

a) The death, resignation, bankruptcy or election of a general partner. No action shall be taken by Aqua Media, Ltd. pursuant to subparagraphs (b) or (c) of paragraph 14 of the Partnership Agreement (Exhibit A, p. 12) until expiration of a period of fifteen (15) days following such notice.

b) The death, removal or election of a limited partner. No action shall be taken by Aqua Media, Ltd. pursuant to paragraph 15 of the Partnership Agreement (Exhibit A, p. 12) until expiration of a period of fifteen (15) days following such notice.

c) The assignment of a partner's interest. No action shall be taken by Aqua Media, Ltd. pursuant to paragraph 20 of the Partnership Agreement (Exhibit A, p. 14) until expiration of a period of fifteen (15) days following such notice.

d) The intention of the partnership to sell, assign, transfer or convey any asset having a fair market value of more than $5,000, other than in the ordinary course of business. No such sale, assignment, transfer or conveyance shall be made by Aqua Media, Ltd. until expiration of a period of fifteen (15) days following such notice.

e) The intention of the general partners to cause the voluntary reduction of the then current level of business of the partnership. No such intended action shall be taken by Aqua Media, Ltd. until expiration of a period of fifteen (15) days following such notice.

6. In the event notice is given to Plaintiff pursuant to the foregoing orders and, during the fifteen (15) day period provided for therein, Plaintiff gives written notice to the Court and the defendants that it objects to any such intended action, which notice shall state the reasons for said objection, Aqua Media, Ltd. and its general and limited partners, employees, successors and assigns and all other persons acting on their behalf are each further ordered to refrain from the intended action objected to by plaintiff unless or until the Court has ruled upon any motion or application by Aqua Media, Ltd. that such action be permitted.

7. The foregoing Orders shall remain in full force and effect until further Order of the Court.

Dated: 4-27-77

/s/ L. T. Lydick
Lawrence T. Lydick
United States District Judge

[Exhibit A is not reproduced herein]

Approved as to form:

/s/ Crossan R. Andersen
Crossan R. Andersen

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United States District Court
Central District of California

Civil No. 76-3988-LTL

United States of America,
Plaintiff,
vs.
Coca-Cola Bottling Company of Los Angeles; Arrowhead Puritas Waters, Inc.; Aqua Media, Ltd.; and A. M. Liquidating Co.,
Defendants.

[Filed April 27, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On February 7, 1977, plaintiff filed a motion for a temporary restraining order and preliminary injunction against Aqua Media, Ltd. and A. M. Liquidating Co. On February 11, 1977, the parties entered into a stipulation and proposed order essentially to maintain the status quo, pending the resolution of plaintiff's motion which was then set by the Court for hearing on March 14, 1977. On the basis of the briefs, supporting affidavits, depositions and exhibits, the Court enters these findings of fact and conclusions of law on this motion for a preliminary injunction. The Court has not had the benefit of the examination of witnesses tested under cross-examination nor of the deliberate and thorough presentation by counsel which may be expected during the trial on the merits, after which the Court may reach contrary conclusions.

FINDINGS OF FACT

1. On December 23, 1976, the United States filed its Complaint, charging that an acquisition by Coca-Cola Bottling Company of Los Angeles ("CCLA") and its subsidiary, Arrowhead Puritas Waters, Inc. ("Arrowhead"), of certain assets of Aqua Media, Inc. ("Aqua Media"), along with certain agreements incidental to said acquisition, violated Section 7 of the Clayton Act (15 U.S.C. § 8).

The Defendants

2. Defendant CCLA is a California corporation, with its principal office in Los Angeles. Among its other activities, CCLA holds exclusive franchises for bottling, canning and distributing certain soft drinks in California, Nevada and Hawaii. In 1976 CCLA had total sales of $142 million and total assets of $90 million.

3. In 1969 CCLA acquired all the capital stock of a company named Arrowhead and Puritas Waters, Inc., after which the present name was adopted, and Arrowhead was integrated into CCLA's overall operations. Arrowhead, a California corporation headquartered in Los Angeles, is engaged in both the residential bottled water business and the high purity industrial water service business. The latter operation is conducted within Arrowhead's Industrial Water Division (often called "IWD"). Arrowhead's 1975 revenues from its high purity industrial water service business exceeded $3 million. Arrowhead has manufactured water cooler dispensers, glass bottles, water conditioning equipment and food dispensing machines.

4. Defendant A. M. Liquidating Co., formerly known as Aqua Media, Inc. (hereinafter "Aqua Media"), is a California corporation with its principal place of business in Sunnyvale, California. Since 1967 Aqua Media had been engaged in providing high purity industrial water service to customers in California, in other states, and in certain foreign countries. Beginning in 1972, Aqua Media also commenced the manufacture of high purity industrial water systems and equipment for sale in California and other states. In 1975 Aqua Media had revenues of approximately $7 million.

5. Defendant Aqua Media, Ltd. is a limited partnership organized in California on August 1, 1976 to acquire and operate those assets of Aqua Media which were not sold and transferred to Arrowhead under the acquisition agreements described hereinbelow, including all issued and outstanding stock in Aqua Media International, a California corporation, and 50% partnership interests in Aqua Media of Arizona and Aqua Media of Texas. Aqua Media, Ltd. maintains its principal office in Sunnyvale, California, and is engaged in the manufacture of high purity industrial water equipment for sale in various states, including California, and foreign nations, and providing high purity industrial water service in states other than California and in foreign nations.

Details of the Acquisition

6. The acquisition which is the subject matter of this action consists of several written and oral agreements between Arrowhead and Aqua Media as follows:

(a) On July 20, 1976, Arrowhead and Aqua Media entered into an Asset Purchase Agreement whereby Arrowhead acquired "substantially all of the California industrial water service business assets of Aqua Media." The purchase price was $4,750,000, payable $2,750,000 cash on closing and $2 million in notes payable February 28, 1977. The notes were unconditionally guaranteed by CCLA. Aqua Media agreed not to compete with Arrowhead in the industrial water service business in the State of California for a period of four years, and the agreement provided for a similar covenant not to compete on the part of the founder and president of Aqua Media, Jaren F. Leet. Aqua Media was free to continue in the manufacture and sale of capital equipment for industrial water purification in California and to engage in any business outside California in competition with Arrowhead.

(b) Letter agreement dated July 19, 1976 providing that after the close of the Asset Purchase Agreement Arrowhead would perform in California certain water purification support services for Aqua Media's customers outside California.

(c) Distributorship agreement executed August 2, 1976 whereby Aqua Media appointed Arrowhead as its exclusive distributor for the sale in California of industrial water purification systems and equipment manufactured by Aqua

Media. Said agreement is cancellable by either party upon giving of 90-day notice.

(d) Parol agreement made on or about August 2, 1976 whereby it was agreed that Arrowhead would acquire from Aqua Media certain customer accounts for service to be provided in the State of Nevada.

7. The Asset Purchase Agreement closed on August 2, 1976, at which time title to the assets was transferred from Aqua Media to Arrowhead and the purchase price for such assets was paid and delivered by Arrowhead to Aqua Media. Upon closing, the other agreements referred to above became binding and effective.

8. On May 3; 1976, after having been approached by Arrowhead about purchasing Aqua Media's California industrial water service business and related assets, Aqua Media adopted a plan of complete liquidation, pursuant to Internal Revenue Code Section 337.

9. Pursuant to said plan, Aqua Media engaged in negotiations with CCLA and Arrowhead for the sale of its assets relating to the providing of high purity water service to its California customers, resulting in the acquisition which is the subject of this action, as more particularly described hereinabove.

10. Pursuant to said plan, Aqua Media entered into an agreement with Aqua Media, Ltd. for the sale of its remaining assets (except for accounts receivable and other current assets) for $405,000. The sale and

transfer of such assets closed on August 3, 1976 subject to an escrow which closed September 1, 1976, at which time Aqua Media received $202,500 in cash, the balance of the purchase price of $202,500 payable by promissory note due on March 31, 1977.

11. Pursuant to said plan, Aqua Media proceeded to collect its assets, pay its liabilities and make liquidating distribution to its shareholders. Prior to December 23, 1976, the date on which this action was filed, liquidating distributions of $2,091,000 had been authorized. On December 23, 1976, Aqua Media had assets of $2,488,075, subject to liquidated and undisputed liabilities of $240,015. There were also certain disputed and contingent liabilities. It was then estimated that, upon completion of performance of the plan, there would be an additional $1,394,000 distributable to the shareholders, payment of which was to be made prior to the expiration of a period of 12 months from the date the plan was adopted, *i.e.* on or before May 2, 1977.

12. If the plan does not qualify as a "337 Liquidation," Aqua Media may have to pay additional income taxes in the amount of approximately $600,000, thereby reducing the cash distributions to the shareholders in the amount of $1.72 per share.

Background of the Industry

13. Industrial water service companies provide services that effect the removal of substantially all, or all, minerals and other solid matter dissolved in water. There are numerous categories of industrial

and commercial businesses which require chemically and/or biologically pure water, meaning H_2O with no chemical or biologic contaminants.

14. A substantial number of industrial and commercial concerns who must employ high purity industrial water find it necessary to engage service companies to produce or assist them in producing such water and provide on-going service thereafter. Continuous proper functioning of their water purification system is essential to the on-going operations of many firms.

15. A number of users prefer to deal with a water service company rather than purchase a permanently installed self-regenerating DI system due, *inter alia,* to the high initial cost of a permanently installed self-regenerating system, the cost and inconvenience of maintaining such a system, the bother of training personnel to operate such a system, and the necessity of obtaining emergency service should a company's high purity water purification system break down.

Interstate Commerce

16. CCLA is engaged in interstate commerce.

17. At the time of the acquisition, Aqua Media engaged in interstate commerce. It provided high purity industrial water service in the States of California, Arizona, New Mexico, Oregon, Nevada, and Texas.

18. As part of the transaction, Arrowhead agreed to provide Aqua Media with continuing regeneration

services to support Aqua Media's Arizona, New Mexico and Texas Partnerships, and Aqua Media's Pacific Northwest and other domestic and international service business.

19. As part of the transaction, Arrowhead and Aqua Media agreed that Arrowhead will directly serve 28 Nevada water service customers of Aqua Media, from whom revenues exceeded $21,000 for an eight-month period.

20. Arrowhead has provided mobile DI service and/or supplies to customers in Arizona, including Arizona Public Service Commission, the Salt River (Utilities) Project, and the Maricopa County Parks and Recreation Department, Phoenix. Arizona Public Service, during the period of August 1975 through October 10, 1976, paid Arrowhead over $223,000 for such goods and services. Arrowhead supplied services and related products to (a) Southern California Edison's Mohave Generating Station in Laughlin, Nevada, and (b) Reno Sheet Metal, Reno, Nevada.

21. Arrowhead purchases substantial amounts of supplies necessary to conduct its service operations from out-of-state suppliers. Arrowhead purchases resin for use in its plants, DI exchange tanks and mobile DI units, and for resale to its customers. Such resins regularly were shipped directly to Arrowhead from Rohm and Haas in Philadelphia, Pennsylvania. Large orders of resin intended for Arizona's customers, such as Southern California Edison's out-of-state facility, were shipped directly to the customers from Pennsylvania. Arrowhead also purchased from out-of-state

sources the following products: pumps directly from Goulds Pump in Seneca Falls, New York; Gelman filters made in Michigan through a California distributor, David J. Tripp; and monitors, cells and patch cords directly from Balsbaugh Laboratories in Massachusetts. An Arrowhead report on purchases it made during the period 8/1/75-7/31/76 showed that purchases of resin from Rohm and Haas (Pennsylvania) were $205,600; of Gelman filters from David J. Tripp were $58,600; of monitors, cells and patch cords from Balsbaugh Labs (Massachusetts) were $28,400; and of pumps from Goulds Pump (New York) were $10,600 —for a total of $303,200.

22. Arrowhead has been and is now engaged in interstate commerce.

Line of Commerce

23. Prior to the acquisition, Aqua Media was "engaged in two lines of business, the manufacture and sale of industrial water reverse osmosis and deionization systems and equipment and the furnishing of industrial water service to others. [It] desire[d] to sell and transfer to [Arrowhead] substantially all of its California industrial water service assets." (Asset Purchase Agreement).

24. Defendants' services are related to high purity water, as distinguished from other types of industrial water.

25. The services offered and equipment used by Arrowhead and Aqua Media are essentially similar.

26. High purity industrial water service firms are specialized vendors who offer a unique cluster of services and equipment. These services consist of the design of complete water purification systems to meet customers' specified needs; the provision of all necessary equipment via lease, sale or under service contract; installing, starting and de-bugging the equipment; providing training to customers' employees; providing regular, frequent servicing of the equipment; replacing used or worn equipment; regenerating ion exchange resins; and providing emergency back-up water in bulk or by mobile DI units.

27. High purity industrial water service firms possess unique production facilities. Such companies maintain central facilities for the regeneration of exhausted resins. Such "regeneration plants" provide substantial economies of scale in the regeneration of large quantities of ion exchange resin.

28. Other substantial facilities provided only by industrial water service companies are mobile DI units (sometimes called mobile demineralizers), which consists of large trailer-mounted two and three bed deionizers. Said units are available for dispatch to the premises of a customer, such as an electrical utility of semiconductor manufacturer, for emergency or temporary use when the customer's water system becomes inoperative or requires a supplementary supply of high purity water.

29. Only industrial water services companies offer portable DI exchange tanks and service.

30. High purity industrial water service firms sell to distinct customers. Major customers include: hospitals; laboratories; plating companies; aerospace firms; electronics manufacturers; food processors; power utilities/shipping companies; pharmaceutical/cosmetic companies; and educational institutions.

31. Customers and competitors of Arrowhead and Aqua Media recognize the high purity industrial water service industry as a separate and distinct business. Numerous manufacturers, hospitals, laboratories, and electrical utilities who require high purity water consider contracting with the service companies active in this field as the only practical solution to their water requirements.

32. The high purity industrial water service market has distinctive prices and lacks sensitivity to price changes in other markets. Because many customers find no reasonable substitute for their services, pricing by service companies is largely restricted only by the competition presented by other service companies.

33. The proper "line of commerce," or product market, is high purity industrial water service, including the provision or sale of certain goods and equipment incidental thereto.

Section of the Country

34. The Court finds that each of the three geographical markets—the State of California, the sub-market of Southern California, and the sub-market of Northern California—are commercially realistic and economically significant markets, and that each constitutes a "section of the country" within which to test the validity of the instant acquisition.

The Effects of the Acquisition

A. *The Southern California Market*

35. Prior to the acquisition, the respective market shares, on a dollar-volume basis, for the Southern California market were as follows:

IWD	51%
Aqua Media	26%
Culligan	23%

An effect of the acquisition by Arrowhead has been to substantially eliminate competition in the Southern California market.

B. *The Northern California Market*

36. Prior to the acquisition the Northern California market shares, on a dollar-volume basis, were as follows:

Aqua Media	81%
Culligan	10%
IWD	9%

An effect of the acquisition by Arrowhead has been to substantially eliminate competition in the Northern California market.

C. *The State as a Whole*

37. Prior to the acquisition the 1976 market shares, on a dollar-volume basis, for the State of California were as follows:

	$ (millions)	*%*
Aqua Media	5.5	44
Arrowhead	4.5	36
Culligan—LA	1.2	9
Culligan—Santa Clara	.25	2
Culligan—Orange County	.25	2
Culligan—San Diego	.36	3
Continental—LA	.25	2
Continental—Palo Alto	.02	–
IWC, Aqua-Con, etc.	.25	2
TOTAL	12.58	100

An effect of the acquisition by Arrowhead has been to substantially eliminate competition in the California market.

38. The elimination of Aqua Media removes a marketer who was responsible for lowering prices in Southern California. When Aqua Media expanded from its Northern California base to invade the Southern California market, it engaged in sharp price cutting, which Arrowhead ultimately met. In bidding to the Los Angeles Department of Water and Power (DWP), Aqua Media's first bid was 54% lower than Arrowhead's previous quotes. Arrowhead subsequently responded with lower bids and in March 1976, Aqua Media bid the lowest quotation DWP received, which bid was over 2½ times cheaper than the price before Aqua Media entered the market. Following Arrowhead's acquisition of Aqua Media's service assets in California, the quotation to DWP was increased by approximately 35%.

39. The merger eliminates Arrowhead's efforts to obtain Aqua Media's customers by price cutting, since Arrowhead acquired Aqua Media's pre-existing service contracts with customers. Prior to the merger, Arrowhead had emulated Aqua Media's earlier invasion of the Southern California market by engaging in substantial price competition in Northern California. Arrowhead was also on the verge of building a regeneration plant in Northern California, which plan is now shelved.

D. *Other Effects of the Acquisition*

40. An effect of the acquisition has been to substantially raise barriers to entry into the relevant line of commerce.

41. The relevant line of commerce is a concentrated industry, and an effect of the acquisition has been to accelerate a trend towards concentration in the relevant market.

42. Both Arrowhead and Aqua Media have increased their respective shares of the relevant line of commerce through acquisition, in addition to internal expansion.

It is Probable that Plaintiff will Prevail on the Merits

43. From all the foregoing, the Court finds it reasonably probable that the effect of the CCLA-Arrow-

head acquisition of the California high purity industrial water service assets of Aqua Media may be to lessen competition substantially and tend to create a monopoly in the high purity industrial water service business in the Southern California, Northern California and State of California markets.

The Remedy of Rescission

44. Rescission may be an effective, practical and feasible means of restoring competition in the affected markets. Rescission may be superior to other forms of relief.

45. Aqua Media, Ltd. has superior knowledge of the business and assets which Aqua Media sold to CCLA-Arrowhead and continues to engage in the high purity industrial water service business in Arizona, New Mexico, Texas and other states. In California, it continues to engage in the manufacture of high purity industrial water systems and equipment for sale in California and other states.

46. Divestiture may be difficult or impossible for want of an appropriate purchaser of the acquired assets. It is not conclusive that divestiture will be available and that rescission will not be needed.

47. The potential hardships which Aqua Media and Aqua Media, Ltd. may suffer as a result of retaining rescission as a possible remedy are insufficient to require abandonment of the remedy of rescission.

48. A. M. Liquidating Co. intends to immediately distribute to its shareholders the net proceeds of approximatly $2 million paid to it by CCLA on February 28, 1977, and intends to dissolve completely on or before May 3, 1977. Such actions would either severely limit the Court's ability to order effective relief or make such relief impossible.

49. To qualify for the nonrecognition of gain or loss in accordance with Section 337 of the Internal Revenue Code of 1954, as amended, A. M. Liquidating Co. desires to distribute all of its assets to a liquidating trust, within 12 months from May 3, 1976, the date on which the Plan was adopted. Such distribution to a liquidating trust would not impair the Court's ability to order rescission or other relief against these defendants, so long as the net proceeds of liquidation which would be distributable to the shareholders are retained by the trustee during the pendency of this litigation, and are subject to the jurisdiction of the Court.

50. If Aqua Media, Ltd. were to substantially alter its high purity industrial water service or equipment manufacturing business or were to terminate the partnership, the Court's ability to order relief against it might be substantially impaired.

CONCLUSIONS OF LAW

The Court makes the following conclusions of law:

1. This Court has jurisdiction over the subject matter of this action and these defendants by virtue of Section 15 of the Clayton Act (15 U.S.C. § 25).

2. CCLA and Arrowhead are corporations engaged in the flow of commerce, as defined in *United States*

v. American Building Maintenance Industries, 422 U.S. 271 (1975), and are subject to the jurisdiction of the Federal Trade Commission.

3. Aqua Media, Inc. (now named A. M. Liquidating Co.) is a corporation which was engaged in the flow of commerce prior to the sale of its assets to Arrowhead and to Aqua Media, Ltd.

4. Aqua Media, Ltd. is a partnership engaged in the flow of commerce.

5. The proper "line of commerce" is high purity industrial water service, including the provision of goods and equipment incidental thereto.

6. The proper "sections of the country" are (1) Southern California, (2) Northern California, and (3) the State of California.

7. It is reasonably probable that the effect of the CCLA-Arrowhead acquisition of the high purity industrial water service assets of Aqua Media may be substantially to lessen competition or to tend to create a monopoly in each of the three sections of the country.

8. It is reasonably probable that the plaintiff will prevail at trial on the merits.

9. The remedy of rescission of a sale of assets may be ordered in a proceeding under Section 7 of the Clayton Act in order to restore effectively market competition.

10. Economic hardships to the defendants in a Section 7 case and adverse tax consequences to the defendants' shareholders can influence the choice only as among two or more effective remedies. If the Court concludes that measures other than rescission will not be effective to redress a violation, and that rescission is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardships and adverse tax consequences may result.

11. A preliminary injunction is necessary in this case to preserve the status quo, and to preserve the ability of the Court to order effective relief should plaintiff prevail at trial on the merits.

Dated: 4-27-77

/s/ L. T. Lydick
Lawrence T. Lydick
United States District Judge

Approved as to form:
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Appendix B

United States Court of Appeals,
Ninth Circuit.

Nos. 77-2683, 77-2778.

United States of America,
Plaintiff-Appellee,
vs.
Coca-Cola Bottling Company of Los Angeles and Arrowhead Puritas Waters, Inc.,
Defendants,
and
Aqua Media, Ltd., and A. M. Liquidating Co.,
Defendants-Appellants.

March 28, 1978.

Rehearing and Rehearing En Banc
Denied May 18, 1978.

Appeal From The United States District Court
For The Central District of California.

Before: CARTER and GOODWIN, Circuit Judges, and SOLOMON,* District Judge.

JAMES M. CARTER, Circuit Judge:

These are consolidated interlocutory appeals from a preliminary injunction and from an order denying appellants' motion to dissolve the same injunction.

*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

The injunction arose in a suit by the United States against both the buyers and the sellers in a corporate acquisition which is alleged to violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The complaint sought divestiture or rescission of the acquisition as alternative remedies. To preserve the possibility of a decree of rescission at the conclusion of trial, the district court, on motion of the government, issued a preliminary injunction maintaining the status quo *pendente lite*. The sellers contend on appeal: (1) the remedy of rescission is not legally available to redress violations of Section 7 of the Clayton Act, and (2) even if legally permissible, rescission is precluded by the particular facts of this case. We *AFFIRM*.

I. FACTS.

A. *Background and Parties.*

The buyer-defendants below are Coca-Cola Bottling Company of Los Angeles (CCLA) and its wholly-owned subsidiary, Arrowhead Puritas Waters, Inc. (Arrowhead). The seller-defendants, appellants herein, are A. M. Liquidating Company, a closely held California corporation presently in liquidation, and Aqua Media, Ltd., a California limited partnership. Appellant A. M. Liquidating Company was formerly called Aqua Media, Inc., but when the majority of the assets of Aqua Media, Inc. were sold to Arrowhead the corporation changed its name and began liquidation. The limited partnership, Aqua Media, Ltd. was formed at the time of the sale by certain stockholders of Aqua Media, Inc. to purchase

and operate the company's remaining manufacturing and service business. For convenience both appellants are some times collectively referred to as "Aqua Media".

The defendants in the antitrust suit below are all industrial water service companies engaged in the provision of high purity industrial water services. Numerous categories of industrial and commercial businesses require water from which substantially all the impurities have been removed.[1] This chemically and biologically pure water is obtained either by purchasing it directly from industrial water service companies or by purchasing the purification equipment itself from the same companies.[2]

Aqua Media, Inc. was incorporated in 1967.[3] Its primary line of business was the provision of purified water to industrial and commercial users. Most of its business centered in California, but eventually the company's services expanded into Arizona, New Mexico, Texas and the Pacific Northwest. Certain foreign countries also purchased from the corporation.

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[1]Major customers include hospitals, laboratories, plating companies, aerospace firms, electronics manufacturers, food processors, power utilities/shipping companies, pharmaceutical/cosmetic companies and educational institutions.

[2]Many users prefer to purchase the water itself rather than equip and maintain purification systems due, *inter alia*, to the high initial cost of a permanently installed system, the cost and inconvenience of maintaining a system, the bother of training personnel to operate the system, and the necessity of obtaining emergency service should a company's high purity water purification system break down.

[3]Aqua Media, Inc. was originally incorporated under the name "Pacific Pure Water Co." On April 30, 1969 its name was changed to Aqua Media, Inc.

In 1972 Aqua Media, Inc. developed a secondary line of business—the manufacture of systems and equipment for industrial water purification. Originally the company considered its two lines of business to be compatible, but by early 1976 its board of directors had determined that the best vehicle for expansion into national and international markets was the provision of systems and equipment rather than provision of the water itself. Because the California market was considered to be finite the board concluded that Aqua Media, Inc., as then capitalized, did not have sufficient working capital to expand into the national and international markets while at the same time maintaining its California water provision services. It was in this posture that Aqua Media, Inc. received Arrowhead's invitation to enter negotiations for the sale of its California service business and related assets.

B. *The Acquisition.*

On May 3, 1976, in contemplation of the possible sale of its California service business to Arrowhead, Aqua Media, Inc. adopted a plan of complete liquidation in compliance with the Internal Revenue Code, § 337. The plan, designed to make the eventual sale tax free at the corporate level, was contingent upon the company entering a binding contract of sale with Arrowhead.

Aqua Media, Inc. then negotiated with Arrowhead and on July 20, 1976, the two entered an asset purchase agreement whereby Arrowhead acquired "substantially all of the California industrial water service business assets of Aqua Media." R. 632. The purchase price was $4,750,000, payable $2,750,000 cash on closing and $2,000,000 in promissory notes payable February 28, 1977.

In addition three ancillary agreements were entered: (1) a letter agreement dated July 19, 1976, provided that Arrowhead would provide certain water purification support services for Aqua Media's customers outside California; (2) a distributorship agreement executed August 2, 1976, appointed Arrowhead to be Aqua Media, Inc.'s exclusive distributor for the sale in California of Aqua Media's water purification systems and equipment; and (3) a parol agreement on or about August 2, 1976, granted to Arrowhead certain of Aqua Media's customer accounts in Nevada.

The acquisition agreement was closed on August 2, 1976, when Arrowhead paid the $2,750,000 cash and delivered two promissory notes in the aggregate of $2,000,000 payable on February 28, 1977. Aqua Media passed clear title to the assets sold.

On the next day, pursuant to its plan, Aqua Media, Inc. sold its remaining assets[4] to the newly formed limited partnership, Aqua Media, Ltd.[5] Aqua Media,

[4]These included the remaining water service assets outside California and the manufacturing business assets. The purchase price was $405,000.

[5]When it approved the sale of assets to Arrowhead, the board of directors of Aqua Media, Inc. also approved a written offer by two members of the company's management team to purchase the remaining assets. The sale of these residual assets was con-

Inc. then changed its name to A. M. Liquidating Company.

The liquidating company proceeded to collect its assets, pay its liabilities and make liquidating distributions to its shareholders. Prior to December 23, 1976, the date on which this action was filed, liquidating distributions of $2,091,000 had been authorized and paid. On December 23, 1976, the company had assets of $2,488,075 subject to liquidated and undisputed liabilities of $240,015 and certain contingent and disputed liabilities. It was then estimated that upon completion of the plan an additional $1,394,000 would be distributable to the shareholders.

C. *Procedural History.*

The Department of Justice filed its complaint on December 23, 1976, naming both the buyers (CCLA and Arrowhead) and the sellers (A. M. Liquidating Company and Aqua Media, Ltd.) as defendants. The complaint sought divestiture or rescission as alternative remedies "to prevent and restrain the continuing violation by the defendants . . . of Section 7 of the Clayton Act (15 U.S.C. § 18)." Appellants moved alternatively for dismissal, summary judgment or an order striking the prayer for rescission. They contended that Section 7 of the Clayton Act applies only to the conduct of buyers in prohibited acquisitions, not that of sellers. Accordingly they maintained

ditioned upon the creation of a limited partnership in which every Aqua Media shareholder would have the right to participate as a limited partner in the same proportion as their voting stock bore to all of the issued and outstanding stock of the corporation.

rescission was not an available remedy in Section 7 cases. They also argued that even if rescission was available in proper cases, as a matter of law it is not available in the facts of this case. The motion was denied from the bench.

The government then moved immediately for a temporary restraining order and a preliminary injunction to prevent A. M. Liquidating Company and Aqua Media, Ltd. from further inplementing the plan of liquidation by distributing the proceeds of the sale, except for certain payments currently due to bona fide creditors. By stipulated order appellants were temporarily enjoined pending a hearing on the government's motion. On March 14, 1977, after a hearing, the district judge granted the government's motion. He explained:

> "In our view the government has sustained its burden of showing substantial likelihood of its success on the merits when the action is tried and, further, that the public interest outweighs the hardships claimed by the Defendants.
>
> "While we concur with the abstract proposition that sellers are not liable under the Clayton Act, we hold that in this case the requested injunction may issue because on the record before us an effective remedial order, if the merger is completed, would be either impossible or severely limited.
>
> "The argument that rescission here is not available is inconclusive, and the Court retains that option.
>
> "A preliminary injunction, in our view, is necessary to maintain the status quo."

The preliminary injunction order was filed April 27, 1977, accompanied by extensive findings of fact and conclusions of law.[6] Appellants moved to dissolve the injunction on the same grounds they originally argued. Their motion was denied. From the preliminary injunction and the denial of their motion to dissolve it A. M. Liquidating Company and Aqua Media, Ltd. appeal.

II. LEGAL AVAILABILITY OF RESCISSION.

We note at the outset that this case is before us in a unique posture. The district judge has not held a trial on the merits and has not decreed any final relief. We are only conducting an interlocutory review of the preliminary injunction. Yet the injunction is forward-looking, preserving the *status quo pendente lite* in contemplation of a potential decree of rescission. Appellants' arguments center not on any immediate harm caused them by the injunction itself, but on the legal and factual availability of the ultimately possible remedy of rescission. Thus our review of the legal issue involved—the availability of

[6]Factually the district judge concluded that rescission might be the only effective remedy if a violation is eventually proven. It was noted that divestiture might be unworkable due to the lack of interested buyers and the high entry barriers in the high purity industrial water service market.

Legally the judge concluded that it was reasonably probable that the government would prevail at a trial on the merits; that the remedy of rescission of a sale of assets may be ordered in a proceeding under Section 7 of the Clayton Act in order to restore effective market competition; and that economic hardships to the sellers, in the event rescission is found to be the only effective remedy, cannot outweigh the public's interest in meaningful antitrust relief.

rescission in Clayton § 7 cases—is conducted largely in the abstract. And our review of the factual availability of the remedy in this case is significantly restricted by the lack of a well-developed factual background.

The precise issue on appeal is whether the district court based its decision on an erroneous legal premise or abused its discretion in granting the preliminary injunction. *Aguirre v. Chula Vista Sanitary Service and Sani-Tainer, Inc.*, 542 F.2d 779, 780-81 (9 Cir. 1976); *Douglas v. Beneficial Finance Co.*, 469 F.2d 453, 454 (9 Cir. 1972). Aqua Media's central challenge is directed at the district court's legal conclusion that rescission is a permissible remedy in Clayton Act § 7 cases. Appellants maintain their conduct is not proscribed by § 7 and that there is no legal authority for an order of rescission again a non-violator of the act. The availability of rescission of an acquisition violative of § 7 of the Clayton Act is a matter of first impression in the federal circuit courts, but our review of the statutory scheme provided by § 7 and § 15 of the Clayton Act, the history of equity jurisdiction in the federal courts, and the treatment of similar claims in the lower courts convinces us that in appropriate cases rescission can be ordered.

In relevant part § 7 of the Clayton Act reads:

> "No corporation engaged in commerce *shall acquire,* directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission *shall acquire* the

whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." (Emphasis added.)

By its express terms, § 7 proscribes only the act of acquiring, not selling, when the forbidden effects may occur. Aqua Media is correct in its initial assertion that technically it has not violated the Clayton Act. See *Dailey v. Quality School Plan,* 380 F.2d 484 (5th Cir. 1967); *U. S. v. Parker-Hannifin Corp.,* 1974 Trade Cases ¶ 75,061 (C.D.Cal.1974); *Record Club of America, Inc. v. Capitol Records, Inc.,* 1971 Trade Cases ¶ 73,694 (S.D.N.Y.1971); *In the Matter of Dean Foods, et al.,* 70 F.T.C. 1146 (1966). Nevertheless, the fact that sellers are not violators of § 7 does not force courts to close their eyes to the fact that the sellers are parties to an acquisition which is prohibited by law. Congress recognized that on occasion third parties whose conduct is not specifically addressed by the Clayton Act would be so related to the anti-competitive effects at which the act was directed that their presence would be necessary in order to fashion complete relief. Accordingly, in § 15 of the Clayton Act Congress invoked the equity jurisdiction of the federal courts and provided that when the interest of justice requires, third parties can be joined in proceedings under the act:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall

be the duty of the several United States attorneys . . . to *institute proceedings in equity to prevent and restrain such violations.* . . . Whenever it shall appear to the court before which any such proceeding may be pending that *the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned* . . ." (Emphasis added.)

The equity jurisdiction of the federal courts traditionally has permitted the fashioning of broad and flexible decrees molded to the necessities of the individual case. Particularly, when equity jurisdiction has been invoked to enforce federal statutory prohibitions, the Supreme Court repeatedly has recognized the power of the equity court to mold the necessary decrees to give effect to congressional policy. *See, e.g., United States v. First Nat. City Bank,* 379 U.S. 378, 383, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965); *J. I. Case Co. v. Borak,* 377 U.S. 426, 433, 84 S.Ct. 1555, 12 L.Ed. 2d 423 (1964); *Mitchell v. Robert De Mario Jewelry, Inc.,* 361 U.S. 288, 291-92, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *Porter v. Warner Holding Company,* 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946); *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944). In such cases "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. First Nat. City Bank, supra,* 379 U.S. at 383, 85 S.Ct. at 531, citing with approval *Virginia Railroad Co. v. System Federation No. 40,* 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789 (1937).

Porter v. Warner Holding Company, supra, is an instructive example. There the Supreme Court was concerned with the power of a federal court, in an enforcement proceeding under § 205(a) of the Emergency Price Control Act of 1942, to order restitution of rents collected by a landlord in excess of the permissible maximums. The Administrator of the Office of Price Administration had sought restitution, but both the federal district court and the federal circuit court below were unwilling to assume jurisdiction to order the requested relief absent statutory authorization. In a strongly worded reversal the Court explained the inherent equity jurisdiction of the district court:

> ". . . Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. [Citation omitted.] Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. *Camp v. Boyd,* 229 U.S. 530, 551-552, 33 S.Ct. 785, 57 L.Ed. 1317 (1913).
>
> "Moreover, the comprehensivness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." *Porter v. Warner Holding Co., supra,* 328 U.S. at 398, 66 S.Ct. at 1089.

Indeed, the necessity of broad equity powers to enforce the antitrust laws has often been declared. When construing § 1 of the Sherman Act and § 3 of the Clayton Act in *International Salt Co., Inc. v. United States*, 332 U.S. 392, 400-01, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947) the Supreme Court stated that the district courts:

> ". . . are invested with large discretion to model their judgments to fit the exigencies of the particular case. [Citations omitted.] In an equity suit, the end to be served is not punishment of past transgressions nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause."

And when affirming the power of the district court under § 7 of the Clayton Act to order divestiture, another far-reaching and drastic remedy, the Supreme

Court was careful to note the "general consideration" that the "courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *United States v. E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316, 326, 81 S.Ct. 1243, 1250, 6 L.Ed.2d 318 (1961).

The district courts have frequently been faced with the necessity of granting relief against third parties in order to effectively enforce § 7 of the Clayton Act. Consistently they have held that § 15 of the Clayton Act and their general equity jurisdiction authorized relief against such parties if necessary to eliminate the effects of an acquisition offensive to the statute. *See, e.g., United States v. Phillips Petroleum Company*, 367 F.Supp. 1226, 1261-62 (C.D. Cal. 1973), *aff'd mem.*, 418 U.S. 906, 94 S.Ct. 3199, 41 L.Ed.2d 1154 (1974); *United States v. Pabst Brewing Company*, 183 F.Supp. 220, 221 (E.D. Wis. 1960); *United States v. E. I. du Pont de Nemours & Co.*, 177 F.Supp. 1, 10-12 (N.D.Ill. 1959), *reversed on other grounds*, 366 U.S. 316, 81 S.Ct. 1243, 6 L.Ed.2d 318 (1961).[7] Several district courts have retained sellers as parties while specifically considering rescission under § 7, but ultimately decreed other forms of relief thought to be more effective. *United States v. Reed Roller Bit Company*, 274 F.Supp. 573 (W.D.Okl. 1967); *United States v. Phillips Petroleum Company, supra.*

Based on the foregoing we conclude that rescission is not without the pale of equitable discretion in appropriate circumstances.[8] We are mindful that the equity power of the courts is not unbounded. Each decree must be tested on review to determine whether

[7]In the *du Pont* litigation, *supra*, the district court initially dismissed the government's entire complaint. Reversing the Supreme Court seemed to sanction joinder of third parties:

> "The motion of the appellees Christiana Securities Company and Delaware Realty and Investment Company for dismissal of the appeal as to them is denied. It seems appropriate that they be retained as parties pending determination by the District Court of the relief to be granted." *United States v. E. I. du Pont de Nemours & Co., et al.*, 353 U.S. 586, 608, 77 S.Ct. 872, 885, 1 L.Ed.2d 1057 (1957).

On remand the district court granted relief against not only the buyer, but also the seller, General Motors, and other related third parties, Christiana and Delaware. The Supreme Court again reversed, on grounds unrelated to the availability of relief against these third parties, but stated:

> "General Motors, Christiana and Delaware will thus be able to renew, for the district court's decision in the first instance, any objections they may have to the power of the Court to grant relief against them." *United States v. E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316, 334-35, 81 S.Ct. 1243, 1255, 6 L.Ed.2d 318 (1961).

This second pronouncement seems to leave as an open question the issue of whether relief can be granted against third parties. Appellants contend this second pronouncement by the Supreme Court implies that sellers cannot be joined as parties in an action under § 7 when the acquisition is consummated. However, the comment is nothing more than a recognition of the issue by the Court. If anything, the Supreme Court's first pronouncement suggests the leaning of the Court.

[8]We note that the remedy of rescission has been approved, albeit in distinguishable circumstances, by the Supreme Court in *J. I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed. 2d 423 (1964). *Borak* involved a violation of § 14(a) of the Securities Exchange Act of 1934. It resulted in rescission of a merger where the consent of the stockholders was obtained through the use of false and misleading proxy statements. Admittedly this case involves a different statute and arguably involves no nonviolating parties, but its relevance is in showing that the remedy of rescission is an appropriate form of equitable relief. The Supreme Court justified the remedy by resort to the broad equitable powers of the court to effectuate congressional policy. *See* 377 U.S. at 433, 84 S.Ct. 1555.

the district court has abused its discretion or whether the dictates of due process have been infringed. The fact that sellers in § 7 cases are not technical violators of the law is itself a strong equity consideration against rescission. Normally relief should be molded, if possible, which does not adversely affect the interests of nonviolators. Nevertheless, if effective implementation of public policy cannot be decreed without adversely involving third parties, courts in equity may, within limits, involve such parties in the relief to be granted.

Aqua Media seeks to avoid the broad equity power invoked by § 15 of the Clayton Act by construing the section as a limitation on the equity power of the district courts.[9] Section 15 invokes the equity jurisdiction of the district courts to "prevent and restrain" violations of the Clayton Act. Appellants would have us interpret this language to authorize the district court to act against violations only *prior* to the time the acquisition actually occurs. Allegedly, after an illegal acquisition occurs it becomes a *"fait accompli"* and can no longer be "prevented" or "restrained". Thus, Aqua Media concedes the authority of the district court to grant relief against sellers prior to consummation of a disputed acquisition agreement, but contends no authority to fashion relief exists if the buyer and seller are fortunate enough to finalize

[9]Aqua Media also argues, based on contract law, that rescission cannot be ordered absent assent of the parties. Suffice it to say that this contention is inapposite. The equity power of district courts to fashion effective relief is not constrained by technical doctrines of contract law.

their purchase-sale contract before the acquisition is challenged.

The short answer to appellants' contention is that their reading of § 15 strains the normal meaning of the terms "prevent" and "restrain" far out of perspective. Moreover, as previously noted, the Supreme Court in *Porter v. Warner Holding Company, supra* at 398, 66 S.Ct. 1086, 1089 has precluded us from implying, where not explicit, a statutory restriction of the district court's inherent equity jurisdiction:

> ". . . the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown v. Swann,* 10 Pet. 497, 503, 9 L.Ed. 508."

See also Mitchell v. DeMario Jewelry, supra, 361 U.S. at 291, 80 S.Ct. 332.

Furthermore, the Supreme Court has given us explicit direction as to the scope of relief affordable under § 15:

> ". . . The relief which can be afforded under [§ 15] is not limited to the restoration of the *status quo ante*. There is no power to turn back the clock. Rather, the relief must be directed to that which is 'necessary and appropriate in the public interest *to eliminate the effects* of the

aquisition offensive to the statute,' *United States v. DuPont & Co.*, 353 U.S. 586, 607, 77 S.Ct. 872, 1 L.Ed.2d 1057 (emphasis added), or which will '*cure the ill effects* of the illegal conduct, and *assure the public freedom from* its continuance.' *United States v. United States Gypsum Co.*, 340 U.S. 76, 88, 71 S.Ct. 160, 95 L.Ed. 89 (emphasis added)." *Ford Motor Company v. United States*, 405 U.S. 562, 573, n. 8, 92 S.Ct. 1142, 1149, 31 L.Ed.2d 492 (1972).

Section 7 of the Clayton Act was intended to arrest anticompetitive acquisitions before they work their evil, which may be at or any time after the acquisition. The district court, upon motion of the government, may decree effective relief "at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce." *United States v. E. I. du Pont de Nemours & Co., et al.*, 353 U.S. 586, 597, 77 S.Ct. 872, 879, 1 L.Ed.2d 1057 (1957).

III. DISCRETION OF THE DISTRICT COURT TO ENTER THE INJUNCTION.

Aqua Media does not explicitly allege that the district court abused its discretion in entering the preliminary injunction preserving the status quo *pendente lite*. However, their argument of the facts throughout their brief and at oral argument can be construed

as an allegation that in the circumstances of this case it was an abuse of discretion by the district court to grant the injunction. Aqua Media presents a strong argument that even if rescission is legally available, it is impermissible in the facts of this case. The strongest point in appellants' favor is the fact that over $2 million of the consideration paid for their California water service assets already has been distributed to the shareholders. This is a compelling argument against the decree of rescission which makes it difficult to conceive of how such a decree might be fashioned without impermissibly injuring either Aqua Media or its shareholders.

Again, however, we note the unique posture of this case. We are not reviewing an actual order of rescission by the district court. The court has not yet granted rescission and may never do so. Rather, we are reviewing a preliminary injunction designed to preserve the ultimate availability of rescission in the event it is determined necessary at the conclusion of a trial on the merits. We can reverse the grant of this injunction as an abuse of discretion only if we conclude that under no conceivable circumstances could a final decree involving rescission be permissible. This we cannot do.

First, in the event a violation is ultimately proven and rescission is deemed necessary, it does not seem impossible for the district court to devise some way to rescind the acquisition without forcing the undoing of the approximately $2 million distribution already made to Aqua Media's shareholders. If nothing

else, the buyers in this transaction—CCLA and Arrowhead—as actual violators of § 7, might be required to give back the illegally acquired assets of Aqua Media without accepting full repayment. It is well established that economic hardship, particularly that of violators of the antitrust laws, can influence choice only as among two or more effective remedies and that the district courts are *required* to decree relief effective to redress antitrust violations "whatever the adverse effect of such decree on private interests." *United States v. du Pont de Nemours & Co., et al.,* 366 U.S. 316, 326-27, 81 S.Ct. 1243, 1250, 6 L.Ed.2d 318 (1961).

Second, numerous factors which have not yet been developed at trial may color the availability of relief against Aqua Media. The trial judge specifically noted in his "Findings of Fact and Conclusions of Law" that he has not yet had the benefit of cross-examination and presentation of argument by counsel to develop a complete picture of the transaction in dispute. It is not inconceivable that proof at trial could show Aqua Media to be a culpable party, though not a technical violator of § 7. For example, it may turn out that Aqua Media was fully aware that its sale to Arrowhead would violate the provisions of § 7. Or proof may show that Aqua Media is now in a strong equitable bargaining position only because it conspired with Arrowhead to make a quick sale and then speeded up its distribution of the proceeds of the sale before the FTC could conduct an investigation

and bring suit.[10] If any culpability on Aqua Media's part is proven it would be relevant to the form of relief eventually granted.

Third, even though the complaint alleges only a violation of § 7 of the Clayton Act, amendment of the complaint is still possible. The complaint should not be dismissed unless "it appears beyond doubt that the [United States] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Further discovery or the proof adduced at trial may expose a violation by Aqua Media of other provisions of the antitrust laws. An acquisition in violation of Clayton § 7 is also potentially a violation of Section 1 or 2 of the Sherman Act or Section 5(a)(1) of the Federal Trade Commission Act. *See* Von Kalinowski, *Antitrust Laws and Trade Regulation* § 15.06. We are not intimating that these acts have been violated or that such violations could be proved against Aqua Media. We simply recognize that proof of what actually occurred is yet to be made. A showing that Aqua Media violated some other antitrust provision is at least a possibility and would not only be relevant to the availability of rescission against it under § 7 of the Clayton Act, but also would be an independent ground for relief.

Precisely because we do not know what trial will show and because we do not know what form of relief

[10]Within 13 days of reaching the negotiated agreement on July 20, 1976, Aqua Media held an annual shareholder meeting at which the proposals were approved and proceeded to close the agreement with Arrowhead on August 2, 1976.

the district court will eventually devise, if any, we cannot say that there are no circumstances in this case in which rescission would be permissible.

Finally, we note that Aqua Media has not pursued on appeal its contention in the district court that the preliminary injunction would cause undue hardship. In that regard the district court has permitted A. M. Liquidating Company to distribute its assets to a trustee, satisfying § 337 of the Internal Revenue Code and making the liquidation tax free at the corporate level. And evidence seems sufficient that 1.) the partners of Aqua Media, Ltd. will not be unable to meet their obligations to make capital contributions to the partnership because the liquidation has been suspended, and 2.) Aqua Media, Ltd. will be able to raise sufficient operating capital to pursue its manufacturing business while defending this suit.

IV. CONCLUSION

The federal district courts are not precluded as a matter of law from ordering rescission of acquisitions found to be in violation of § 7 of the Clayton Act. Each case must be decided on the basis of the equities of its individual facts. The preliminary injunction issued in this case was within the discretion of the district judge because we cannot say that no form of relief involving rescission is available on the facts of this case and because the interests of the enjoined parties have been adequately protected by the preliminary injunction order. The order of the district court is *AFFIRMED.*

United States Court of Appeals
For The Ninth Circuit

Nos. 77-2683 and 77-2778

United States of America,
Plaintiff-Appellee,
vs.
Coca-Cola Bottling Company of Los Angeles,
Arrowhead Puritas Waters, Inc.,
Defendants,
and
Aqua Media, Ltd., and A. M. Liquidating Co.,
Defendants-Appellants.

[Filed May 18, 1978]

ORDER DENYING PETITION FOR REHEARING AND REJECTING THE SUGGESTION FOR REHEARING EN BANC

Before: CARTER, GOODWIN and SOLOMON, Judges.

The panel in the above entitled case voted to deny the petition for rehearing. Judge Goodwin voted to deny the petition for rehearing en banc, and Judge Carter and Judge Solomon recommended the rejection of the suggestion for rehearing en banc.

The petition for rehearing and rehearing en banc having been circulated to all active judges, and no judge having voted for a rehearing en banc,

It Is Ordered that the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C

CLAYTON ACT § 7, 15 U.S.C. § 18:

§ 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any parts of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce

from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything

heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

CLAYTON ACT § 15, 15 U.S.C. § 25:

§ 25. Restraining violations; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition,

and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

Appendix D

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Martin J. Kaplan
Carolyn D. Wulfsberg
Antitrust Division
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Attorneys for Plaintiff

United States District Court
Central District of California
Civil No. 76-3988-LTL

United States of America,
Plaintiff,
vs.
Coca-Cola Bottling Company of Los Angeles;
Arrowhead Puritas Waters, Inc.;
Aqua Media, Ltd.; and
A. M. Liquidating Co.,
Defendants.

STIPULATION

It is stipulated by and between the undersigned parties, plaintiff United States of America, and defendants Coca-Cola Bottling Company of Los Angeles, Arrowhead Puritas Waters, Inc., Aqua Media, Ltd. and A. M. Liquidating Co., by their respective attorneys, that:

1. A final judgment in the form hereto attached may be filed and entered by the Court upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act [15 U.S.C. § 16] and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed final judgment by serving notice thereof on defendants and by filing that notice with the Court.

2. In the event plaintiff withdraws its consent or if the proposed Final Judgment is not entered pursuant to this Stipulation, this Stipulation shall be of no effect whatever and the making of this Stipulation shall be without prejudice to plaintiff and defendants in this or any other proceeding.

Dated:

/s/ Hugh P. Morrison, Jr.
Hugh P. Morrison, Jr.
Acting Assistant Attorney General

/s/ Richard J. Favretto
Richard J. Favretto
/s/ Charles F. B. McAleer
Charles F. B. McAleer
/s/ Raymond P. Hernacki
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Attorneys, Department of Justice

Crossan R. Andersen
Howard J. Parker
/s/ Martin J. Kaplan
Martin J. Kaplan

/s/ Carolyn D. Wulfsberg
Carolyn D. Wulfsberg
Attorneys, Department of Justice

For Defendants Coca-Cola Bottling Company of Los Angeles and Arrowhead Puritas Waters, Inc.

/s/ Don T. Hibner, Jr.
By: Don T. Hibner, Jr.
Sheppard, Mullin, Richter & Hampton

For Defendant Aqua Media, Ltd.

/s/ Dale E. Fredericks
By: Dale E. Fredericks
Sedgwick, Detert, Moran & Arnold

For Defendant A. M. Liquidating Co.

/s/ Karen L. Witte
By: Karen L. Witte
Cooley, Godward, Castro, Huddleston & Tatum

United States District Court
Central District of California
Civil No. 76-3988-LTL

United States of America,
Plaintiff,
vs.
Coca-Cola Bottling Company of Los Angeles;
Arrowhead Puritas Waters, Inc.;
Aqua Media, Ltd.; and
A. M. Liquidating Co.,
Defendants.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint on December 23, 1976, defendants having filed their respective answers thereto, plaintiff's motion for a preliminary injunction having been heard and granted by the Court, the Court having entered findings of fact and conclusions of law, and the parties by their respective attorneys of record, having each consented to the preparation and entry of this Final Judgment, and without this Final Judgment constituting evidence or an admission by any party with respect to any issue consented to;

Now Therefore, upon the consent of each of the parties hereto and upon a determination by this Court that entry of this Judgment will be in the public interest, it is hereby

Ordered, Adjudged And Decreed as follows:

I

This Court has jurisdiction of the subject matter of this action and of each of the parties hereto. The Complaint states a claim upon which relief may be granted against defendants Coca-Cola Bottling Company of Los Angeles and Arrowhead Puritas Waters, Inc. pursuant to Section 7 of the Clayton Act (15 U.S.C. § 18). Defendants Aqua Media, Ltd. and A. M. Liquidating Co. are proper parties defendant to this action pursuant to the general equity powers of this court.

II

In this Final Judgment the following definitions shall apply:

A. "Arrowhead" means defendants Arrowhead Puritas Waters, Inc. and Coca-Cola Bottling Company of Los Angeles, and its subsidiaries;

B. "Aqua Media" means defendant Aqua Media, Ltd.;

C. "Group A Assets" means those properties, equipment, inventory, customer contracts, and other items listed or described in Exhibit A attached hereto;

D. "Group B Assets" means those properties, equipment, inventory, customer contracts, and other items listed or described in Exhibit B attached hereto;

E. "Restrictive Covenants" means those covenants not to compete given by Aqua Media and

Jaren F. Leet to Arrowhead pursuant to the Asset Purchase Agreement.

F. "High purity industrial water service" means the provision of high purity water purification service for commercial and industrial applications and includes the provision and/or sale of certain goods and/or equipment used incident to and in conjunction with such service. High purity industrial water service includes, but is not limited to, bulk water service, deionization exchange tank service, mobile demineralization service, reverse osmosis service, and the provision and/or sale of deionization and/or reverse osmosis equipment used incident to and in conjunction with such service and any combination of the preceding services and equipment. High purity industrial water service is provided to customers which require water purified to a high degree by the total or substantial removal of minerals, organic compounds or other dissolved matter;

G. "Person" means any individual, partnership, association, firm, corporation, or other legal or business entity;

H. "Purchaser" shall mean any one or more persons acquiring assets pursuant to this Final Judgment;

I. "Southern California" shall mean Imperial, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa

Barbara and Ventura Counties in the State of California; and

J. The term "Northern California" means that part of California exclusive of "Southern California."

III

The provisions of this Final Judgment applicable to Arrowhead and Aqua Media, respectively, shall also apply to the directors, officers, agents, employees, subsidiaries, partnerships, successors, and assigns of each, and to all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV

Any divestiture made pursuant to this Final Judgment shall be made to one or more purchasers who shall reasonably demonstrate to the plaintiff and/or the Court, as hereinafter provided, that at the time of divestiture (1) the assets acquired shall be capable of being operated as a going business or businesses, (2) that the purchaser(s) has the potential to compete effectively with Arrowhead, and (3) that the proposed divestiture will effectively restore competition to the high purity industrial water service market in both Northern California and Southern California.

V

A. Arrowhead is ordered and directed to completely divest itself within one year from the date of this Final Judgment of all of its right, title, in-

terest and obligations in either the Group A or Group B Assets in substantial conformance with the description in Exhibits A and B respectively in this Final Judgment. In the event Arrowhead submits to the plaintiff an executed contract of divestiture with a bona fide purchaser in substantial accord with the provisions of this Final Judgment, which divestiture cannot reasonably be completed within said one year period, then such period shall be extended for a reasonable time not to exceed six (6) months within which to complete said divestiture. The application of the provisions of Paragraphs XII to XIX and XXI of this Final Judgment shall be delayed for a like period. For the purpose of this provision, an agreement for divestiture shall be in substantial accord or conformance with the provisions of this Final Judgment if the assets to be sold are at least equal to ninety (90) percent of the assets described in Schedule A.

VI

Arrowhead shall utilize its best efforts to sell the assets and to make known promptly the availability of the assets by the ordinary and usual means. In the event that the divestiture ordered herein has not been completed within sixty (60) days from the entry of this Final Judgment, such best efforts shall include without limitation:

A. Arrowhead shall prepare a brochure separately describing Group A Assets and Group B Assets, the operations carried on by Arrowhead therewith, and the divestiture ordered and directed by this Final Judgment;

B. Arrowhead shall forward said brochure to each person requesting same, to each prospective purchaser known to Arrowhead, and to each company listed in Exhibit D attached hereto;

C. Arrowhead shall employ the services of an investment banker, business opportunity broker or similarly qualified person to assist in the divestiture ordered and directed by this Final Judgment;

D. Arrowhead shall cause an advertisement offering the assets for sale to be published (1) in the national edition of *The Wall Street Journal* for at least seven days during each six month period following the entry of this Final Judgment, and (2) for a reasonable period in at least two additional trade or business publications of national circulation, including one circulated to the water treatment trade;

E. Arrowhead shall direct a person holding a senior management position with Arrowhead or a parent thereof to devote his best efforts and a substantial portion of his time to promote and complete the divestiture directed and ordered by this Final Judgment;

F. Arrowhead shall furnish to all bona fide prospective purchasers all necessary information regarding the assets and the operations carried on by Arrowhead therewith, including revenue and cost data and other available information similar to that provided to Arrowhead by Aqua Media, Inc. prior to the Asset Purchase Agree-

ment dated July 20, 1976. Arrowhead shall permit prospective purchasers to make such inspection of the assets as may be reasonably necessary for the above-stated purpose. Arrowhead shall not be required to submit any such information or materials to anyone unless the recipient thereof executes an affidavit requiring recipient to keep such information and/or materials confidential, not to reproduce the same, and to return the same to Arrowhead in the event a sale to such recipient is not consummated.

G. Prior to the twelfth (12) month after entry of this Final Judgment, Arrowhead shall design and successfully test an accounting system capable of producing actual cost data, and shall also provide pro forma income, balance sheet and operating statements addressing the assets to be divested had such assets actually been operated as an independent, going business. After the sixth (6) month following entry of this Final Judgment, the plaintiff may petition the Court for an order that such accounting system be designed and implemented at an earlier date. Upon such petition plaintiff shall have the burden of proving that such accounting system and financial statements would facilitate the sale of such assets.

VII

A. Arrowhead is ordered and directed to the best of its ability to cooperate with each purchaser. Subject to any limitation in a contract of divestiture

approved by the plaintiff or the Court, Arrowhead shall make available to each purchaser at such purchaser's option:

1. Arrowhead's existing engineering, marketing and installation information and assistance sufficient to allow said purchaser effectively to compete in the high purity industrial water service market. Such assistance shall include the provision of engineers and other qualified operating or management employees to assist in the establishment of management, plant operations, and field service engineering systems, and in solving operational problems as they may arise;

2. Any information utilized by Arrowhead in purchasing raw materials and parts in its high purity industrial water service business sufficient to allow said purchaser to compete effectively in the high purity industrial water service market. For a period of one year after the divestiture, if such raw materials and parts are not available to the purchaser at substantially the same price and terms as to Arrowhead, Arrowhead will sell said raw materials and parts to purchaser at Arrowhead's direct cost.

3. A list of all employees of Arrowhead's Industrial Water Division, together with their job description, annual compensation, accrued sick leave and accrued vacation pay. Purchaser shall have the right, but not the obligation, to offer employment to each such employee.

B. The cost of all information and assistance provided by Arrowhead to the purchaser prior to completion of the divestiture shall be included in the purchase price. If within one year after divestiture Arrowhead, pursuant to this paragraph, provides to the purchaser additional information and/or assistance the cost of which has not been specifically included in the purchase price, such information and/or assistance shall be provided at a price set forth in each contract of divestiture that does not exceed Arrowhead's costs incurred in providing such services.

C. Arrowhead shall have no obligation hereunder to furnish information or assistance to the purchaser if substantially the same information or assistance is available at a price which does not exceed the price set forth in the contract of divestiture either by employing a consulting firm or the necessary personnel. Arrowhead shall not be obligated to furnish to the purchaser customer information unless the service contract of said customer was acquired by the purchaser. Arrowhead shall not be obligated to hire additional personnel in order to comply with the provisions of this paragraph.

VIII

The divestiture ordered and directed by this Final Judgment shall be made in good faith and shall be absolute and unqualified, and except upon written approval by the plaintiff or the Court, Arrowhead shall accept no lien, mortgage, deed of trust or other

form of security on or interest in any portion of the assets sold. Arrowhead shall take no action which will impair or impede the divestiture ordered by this Final Judgment.

IX

Any contract of sale pursuant to this Final Judgment shall require the purchaser to file with this Court its representation that it intends to continue the business of high purity water purification service in Northern California and Southern California, if assets are there acquired, and agree to submit to the jurisdiction of this Court for that limited purpose.

X

Each sixty (60) days following the entry of this Final Judgment until divestiture has been completed, or until the end of twelve (12) months from the date of entry of this Final Judgment, whichever first occurs, Arrowhead shall file with this Court and serve upon plaintiff and Aqua Media an affidavit describing in detail the fact and manner of its efforts to accomplish the divestiture ordered by this Final Judgment. Such reports shall be supplemented by such additional information as the plaintiff may reasonably request.

XI

At least thirty (30) days in advance of the anticipated closing date of each contract of divestiture pursuant to this Final Judgment, Arrowhead shall submit to plaintiff and Aqua Media the name of the proposed purchaser and all pertinent information re-

specting the proposed divestiture together with such additional information as plaintiff may reasonably request in writing. Within twenty (20) days after Arrowhead has supplied all the requested information, plaintiff will advise Arrowhead and Aqua Media in writing of plaintiff's approval or objections to the proposed divestiture. If plaintiff objects to the proposed divestiture, then such contract(s) of divestiture shall not be consummated unless (1) plaintiff notifies Arrowhead in writing of any subsequent approval or unless (2) the Court approves after a hearing at which Arrowhead shall have the burden of proving that the proposed divestiture will effectively restore competition to the high purity industrial water service markets in Northern California and Southern California, if assets are there acquired.

XII

If Arrowhead has not notified the plaintiff and Aqua Media within nine (9) months following the date of entry of this Final Judgment that it has entered into a contract of divestiture, each party shall notify the other in writing of the name and description of not more than three persons it wishes to nominate as a possible trustee. The parties shall seek to agree upon one of the nominees to serve as a trustee for the divestiture ordered by this Final Judgment, and if they are unable to agree, the Court may select a trustee from said nominees after hearing the parties as to the qualifications of the candidates.

XIII

If Arrowhead is unable to complete the divestiture required by this Final Judgment within the period prescribed in Paragraph V above, the Court shall appoint a trustee to serve for a maximum period of fifteen (15) months except as hereinafter provided.

XIV

The trustee's main endeavor shall be to accomplish prompt and full divestiture of the assets described in Paragraph XVI of this Final Judgment, as one or more going businesses in accordance with the provisions of Paragraph IV of this Final Judgment in order effectively to restore competition to the high purity industrial water service market in both Northern California and Southern California and to further the public interest.

XV

The trustee shall perform at the expense of Arrowhead under a schedule of court-approved fees, incentive compensation and costs to be fixed at the time of the trustee's appointment. The trustee shall have the right at any time to petition the Court, with prior written notice thereof to all parties, for further fees and/or incentive compensation for prompt accomplishment of the purposes of the Trust.

XVI

After consulting with the parties, the trustee shall select assets consistent with the description of assets

in Exhibit C together with such other assets as the trustee may deem necessary to enable the trustee to sell one or more going high purity industrial water service businesses and thereby effectively restore competition to the high purity industrial water service market in Northern California and Southern California. Should the trustee select assets in excess of, or inconsistent with, the description of assets in Exhibit C, any party may petition the Court. Upon such petition the moving party shall have the burden of proving that the trustee's selection of assets is contrary to the purposes of the Trust.

XVII

A. The trustee shall have all such powers as are necessary and proper to accomplish divestiture in accordance with the provisions of this Final Judgment. Subject to the provisions of this paragraph, the trustee shall have authority to manage, control, operate and sell by any reasonable means the assets selected for divestiture. Subject to the provisions of this paragraph, the trustee may require Arrowhead to convey all rights, titles, interests and obligations in the selected assets or any portion thereof to any purchaser. Such conveyance shall be absolute and unqualified.

B. The trustee shall have the power to manage the assets selected for divestiture only after the conclusion of the sixth month of the term of the Trust. If the trustee elects at any time to manage such assets, the trustee shall notify Arrowhead thereof in

writing. Should Arrowhead object to the exercise of the trustee's management powers, it shall have ten (10) days from receipt of such notice within which to petition the Court. Upon such petition, Arrowhead shall have the burden of proving that management by the trustee will not facilitate the sale of such assets. Once the trustee assumes such management powers, the trustee may require Arrowhead to convey all rights, title, interests and obligations in the selected assets or any portion thereof to the trustee. Such conveyance shall be absolute and unqualified.

C. The trustee shall have the power to conduct a sale of the assets selected for divestiture upon sealed or public bids after reasonable notice to the parties describing the method of sale. Such sale shall convey the assets so as to be operated as one or more going businesses and shall be subject to the provisions of paragraph XIX of this Final Judgment. Aqua Media shall have the right to bid at any such sale.

D. The trustee's authority shall include without limitation:

1. The right of access to Arrowhead's financial, accounting, production, customer and other records related to any asset owned or in the possession or control of Arrowhead which the trustee may deem necessary to assist in the selection of assets or otherwise;

2. The power to retain investment bankers, business opportunity brokers, accountants, appraisers, consultants, attorneys and any other

persons reasonably needed to assist in the promotion, analysis, or execution of any sales(s) or in managing, operating, or controlling the assets pursuant to this Final Judgment;

3. The power to implement an accounting system to provide revenue data, cost data and other financial and accounting information relating to the selected assets such as would permit the trustee to develop a meaningful *pro forma* operating statement and actual income and balance sheet statements to be used by the trustee in implementing this Final Judgment and the sale of the selected assets; and

4. The power to interview and offer employment to officers and employees of Arrowhead's Industrial Water Division.

XVIII

A. Pending confirmation of a sale, the price, terms, and other conditions of any offer shall be treated as confidential and not subject to disclosure to a third party without prior approval by the Court. The trustee shall not disclose financial or production information or the identification of particular Arrowhead customers to persons other than prospective purchasers and shall only disclose such information to prospective purchasers after having entered into a nondisclosure agreement with such prospective purchasers.

B. Arrowhead shall have the right to designate certain financial information disclosed to the trustee

as "secret." The information so designated shall be limited to that which, if released to a competitor, would grant an unfair competitive advantage and shall be as narrowly restricted as is commercially reasonable. Prior to furnishing information designated as "secret," the trustee shall give written notice to the parties identifying the information and to whom it is to be disclosed. Arrowhead shall have two (2) business days from the receipt of the notice within which to object to such disclosures and to petition the Court to review the intended disclosure. This Court will permit, prohibit or limit such disclosures within seven (7) days following the dispatch of Arrowhead's objection.

XIX

The trustee shall advise the parties of all significant matters arising in the negotiations. Upon the reaching of an understanding in principle on the basic terms and conditions of a prospective sale and at least forty-five (45) days before any proposed consummation date, the trustee shall advise the Court, with notice to the parties, of the identity of the prospective purchaser or purchasers and shall describe the terms and conditions of the prospective sale. Within fourteen (14) days of said notice, any party may file a statement of objections to the proposed sale. Such prospective sale shall not be executed until the parties have had an opportunity to present views and recommendations on any issue presented and to be heard thereon. Such objections shall

be evaluated by the standard set forth in Paragraph IV.

XX

Arrowhead shall provide such reasonable assistance as the trustee may request to enable him to sell selected assets. Such assistance shall include, but shall not be limited to:

A. Furnishing, without cost, all information regarding selected assets and the operations conducted by Arrowhead or Aqua Media, Inc. therewith, including, without limitation, revenue data, cost data, and such other information as shall be requested by the trustee;

B. Permitting the trustee or his agents to make any inspection of any assets and operations of Arrowhead utilized in its high purity industrial water service business;

C. Providing a list of all present and former employees employed by Arrowhead or Aqua Media, Inc. in the industrial high purity water service business, together with last known residence addresses, job descriptions, and annual compensation, to the extent known to Arrowhead. The trustee shall have the right, but not the obligation, to interview privately and offer employment to any such employee;

D. Providing, upon the trustee's request, engineers, accountants, or other qualified operating or management employees to assist in the establishment of management, plant operation and field service engineering systems; in solving operational problems which may arise; and in any other manner;

E. Providing, upon the trustee's request, any information utilized by Arrowhead in purchasing, and/or aid the trustee in obtaining, raw materials or parts in connection with the high purity industrial water service business; and

F. Selling, upon the trustee's request, at its out-of-pocket prices, any raw materials or parts used in connection with Arrowhead's high purity industrial water service businesses.

XXI

For a period of twelve (12) months following the closing of each contract of divestiture, Aqua Media is enjoined and restrained from competing for the high purity industrial water service business of customer accounts acquired by the purchaser pursuant to this Final Judgment. Said injunction shall apply to the provision of service at locations in California and to the sale or provision of equipment for use at locations in California.

XXII

Aqua Media is ordered and directed to:

A. Convey to each purchaser a covenant not to compete in the high purity industrial water service business in California for a period of twelve (12) months following the closing of each contract of divestiture. Such covenant(s) shall not apply to the sale or provision of equipment

to customer accounts other than those customer accounts acquired by the purchaser(s) pursuant to this Final Judgment. Such covenant(s) shall be enforceable only by the purchaser(s) of assets pursuant to this Final Judgment.

B. Offer to the trustee and to the purchaser distributorship agreements for the sale of high purity industrial water purification equipment manufactured by Aqua Media, the terms of which agreements are to be equally or more favorable to the trustee or the purchaser than those contained in the distributorship agreement dated August 2, 1976 between Arrowhead and Aqua Media, Inc., provided that Aqua Media shall not be obligated hereunder to offer a distributorship agreement to any person that is engaged in the business of selling high purity industrial water purification equipment not manufactured by Aqua Media;

C. Cooperate with the purchaser or trustee in respect to such offers of distributorship agreements and to make available to such purchaser or trustee upon request existing engineering and marketing information with respect to the equipment to be distributed sufficient to allow said purchaser or trustee to compete effectively for the sale of such equipment;

D. Not less than thirty (30) days prior to the closing date of any distributorship agreement or contract of divestiture pursuant to this Final Judgment, Aqua Media shall file with this Court

and serve upon plaintiff, copies of the proposed covenant and/or distributorship agreement and an affidavit describing in detail the fact and manner of its compliance with this paragraph. Such report(s) shall be supplemented by such additional information as the plaintiff may reasonably request.

XXIII

A. In the event the trustee is unable to accomplish or complete the divestiture required by this Final Judgment during the term of the Trust, such term shall be extended pending further orders of the Court. Should the trustee have assumed management or control of, or taken title to the assets selected for divestiture, he shall continue to manage, operate and preserve such assets pending further order of the Court.

B. The trustee may at any time petition the Court for further instructions. Subsequent to exhausting efforts to sell in the manner provided in Paragraph XVII-C or upon further instruction from the Court, such petition may include a request that the Court hold a further hearing for the purpose of determining such other and further relief as may be required. At any such hearing Aqua Media shall not assert that this Court is without power to order such further relief as to Aqua Media as may be just. At such hearing Arrowhead and the plaintiff shall not assert that the Court is without power to order the trustee to convey to Aqua Media such assets as will accomplish or complete the divestiture ordered

by this Final Judgment and effectively restore competition to the high purity industrial water service market in California.

C. To effect any conveyance pursuant to Section B of this paragraph, the trustee shall submit to the Court and the parties a description of the terms of the conveyance to Aqua Media including but not limited to any consideration or restitution to be paid by Aqua Media to Arrowhead for the assets conveyed. Within thirty (30) days thereafter all parties will advise the trustee of their objections, if any, to the proposed conveyance.

D. Any conveyance made pursuant to this paragraph shall be absolute and unqualified, and Arrowhead shall take no action which will impair or impede such conveyance.

XXIV

Aqua Media and Arrowhead are directed and ordered to terminate upon the entry of this Final Judgment, the Restrictive Covenants and the same shall no longer be enforceable thereafter.

XXV

At any time during the period of ten (10) years from the effective date of this Final Consent Judgment, without prior written approval of the plaintiff, Arrowhead is enjoined and restrained from acquiring:

A. Any capital stock of any person engaged in the high purity industrial water service or equipment sales business in California;

B. All or any part of the assets (except for the purchase of products, inventory, or equipment in the normal course of business) of a person engaged in the high purity industrial water service or equipment sales business in California.

XXVI

Except upon prior written approval of the plaintiff, for a period of not less than two (2) years from the closing date of the last contract of divestiture as provided for herein:

A. Arrowhead shall continue to operate as a going business in both Northern California and Southern California that portion of its high purity industrial water service business not divested as a result of this Final Judgment;

B. Arrowhead is enjoined and restrained from selling or disposing of any asset, or taking any other action that would substantially impair or diminish its ability to compete effectively in both Northern California and Southern California in the provision of all different sizes of mobile demineralizers, standard deionization systems and associated service, engineered reverse osmosis-deionization systems and associated service, and the delivery of high purity water in tanker trucks;

C. Arrowhead shall continue to employ personnel and maintain a fleet of vehicles in both Northern California and Southern California.

These personnel and this fleet shall be sufficient to allow Arrowhead to continue in the business of providing to customers in both geographic areas all the different sizes of mobile demineralizers, standard deionization systems and associated service, engineered reverse osmosis-deionization systems and associated service, and the delivery of high purity water in tanker trucks;

D. Arrowhead shall operate an ion exchange resin regeneration facility in Southern California with capacity for resin regeneration of both mobile units and of stationary canisters substantially similar to its capacity as of August 2, 1976 of Arrowhead's Washington Boulevard resin regeneration facility or Arrowhead's Signal Hill resin regeneration facility.

Should divestiture under this Final Judgment result in the transfer to the trustee or the sale of Arrowhead's Sunnyvale resin regeneration facility, Arrowhead shall, within eighteen (18) months after such transfer or sale, establish and commence operation of an ion exchange resin regeneration facility in Northern California with capacity for resin regeneration of both mobile units and of stationary canisters sufficient to service the remaining service accounts in Northern California plus an allowance for reasonable business growth. Thereafter Arrowhead shall operate such facility for at least eighteen (18) months.

XXVII

For ten (10) years from the date of entry of this Final Judgment, sixty (60) days prior to conveying, directly or indirectly, to any person engaged in the high purity industrial water service or equipment business in California (1) any assets employed by Arrowhead in the high purity industrial water service or equipment business in California, other than in the ordinary course of business, or (2) any voting securities of Arrowhead's, Arrowhead shall provide the plaintiff in writing with (1) the name and address of the purchaser, and (2) a description of the assets to be sold, together with the purchase price. Thereafter, Arrowhead shall provide the plaintiff with such other information and documents regarding the transaction as may be requested.

XXVIII

A. For the purpose of determining or securing compliance with this Final Judgment, any defendant shall permit any duly authorized representative of the Department of Justice, upon written request of the Attorney General or Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant at its principal office, subject to any legally recognized privileges:

1. Access, during the office hours of such defendant, which may have counsel present, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the

control of such defendant relating to any matters contained in this Final Judgment; and

2. Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, directors, agents, partners or employees of such defendant, who may have counsel present, regarding any such matters.

B. A defendant, upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division, shall submit such reports in writing, under oath if requested, with respect to any of the matters contained in this Final Judgment as may from time to time be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and said

defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) days notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a Grand Jury proceeding) to which the defendant is not a party.

XXIX

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions herein, for the enforcement or compliance herewith, and for the punishment of the violation of any of the provisions contained herein.

XXX

The Preliminary Injunction entered in this matter on April 28, 1977, is hereby dissolved, and defendant A. M. Liquidating Co. is hereby dismissed.

XXXI

Entry of this Final Judgment is in the public interest.

Dated:

.....

United States District Judge

[Schedules A, B, C and D are not reproduced herein]

No. 78-237

In the Supreme Court of the United States

OCTOBER TERM, 1978

AQUA MEDIA, LTD. AND A. M. LIQUIDATING CO.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-24) is reported at 575 F.2d 222. The opinion of the district court (Pet. App. A-8 to A-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1978. A petition for rehearing was

denied on May 18, 1978 (Pet. App. B-23 to B-24). The petition for a writ of certiorari and the motion for leave to file a petition for a writ of common law certiorari were filed on August 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 28 U.S.C. 1651.[1]

QUESTIONS PRESENTED

1. Whether the district court may order rescission of an acquisition that violates Section 7 of the Clayton Act.

2. Whether a selling corporation may be named as a defendant in a suit brought by the United States to enforce Section 7 of the Clayton Act where title to the assets has passed to the acquiring corporation.

STATEMENT

On December 23, 1976, the United States filed a complaint charging that the acquisition of assets constituting the California high-purity industrial water service business of Aqua Media, Inc. by one of its competitors violated Section 7 of the Clayton Act, 15 U.S.C. 18 (Pet. App. A-9). Petitioners (the selling

[1] Petitioner's motion for leave to file a petition for a writ of common law certiorari does not set out any reason why the grant of jurisdiction under 28 U.S.C. 1254(1) is inadequate to authorize review of the court of appeals' judgment. We know of no such reason. The motion for leave to file therefore should be denied. See also *Ex parte Fahey*, 332 U.S. 258, 259 (1947).

parties)[2] and the purchasers were named as defendants (Pet. App. A-9 to A-10). The complaint sought divestiture of the assets by the purchaser and rescission of certain ancillary agreements between the seller and purchaser or, in the alternative, rescission of the acquisition and the ancillary agreements (*id.* at B-6).

After a hearing, the district court granted the United States' motion for a temporary restraining order and a preliminary injunction to prevent petitioners from taking action that would impair their ability to comply with a final order granting the relief requested (Pet. App. A-1 to A-26). The court concluded that the government had demonstrated a reasonable probability of success at trial on the merits[3] and that rescission of the acquisition might

[2] After the sale Aqua Media, Inc. changed its corporate name to A. M. Liquidating Co. A group of Aqua Media, Inc. stockholders formed a limited partnership, Aqua Media, Ltd., to acquire and operate the remaining assets of Aqua Media, Inc., including its manufacturing business and its high purity industrial water service business outside California (*id.* at A-10 to A-13, B-2 to B-3). A. M. Liquidating Co. and Aqua Media, Ltd. were named as defendants in the complaint and are the petitioners here (Pet. 4).

[3] See Pet. App. A-13 to A-22. The district court found that Aqua Media, Inc. and the purchaser were the two leading competitors in the high-purity industrial water service market in California. They accounted for 80% of the sales in the state as a whole, more than 90% in the Northern California market, and 77% in the Southern California market (Pet. App. A-19 to A-20). Prior to the acquisition, the firms were engaged in intense price competition, and prices rose sharply in at least

be the only form of relief that would effectively restore competition (Pet. App. A-1). The court concluded that "[d]ivestiture may be difficult or impossible for want of an appropriate purchaser of the acquired assets" and that "[r]escission may be an effective, practical and feasible means of restoring competition in the affected markets. Rescission may be superior to other forms of relief" (*id.* at A-22).

Petitioners argued on appeal that no relief may be granted against the seller in a suit by the United States to enforce Section 7 of the Clayton Act once title to the assets has passed, and that rescission of an acquisition is never an available remedy in a Section 7 case.

The court of appeals affirmed (Pet. App. B-1 to B-24). It recognized that Section 7 speaks only to acquisitions, and it concluded that courts should attempt to fashion relief that does not affect the interests of the seller (Pet. App. B-10, B-16). The court observed, however, that Section 15 of the Clayton Act, 15 U.S.C. 25, is a source of equity jurisdiction to prevent and restrain violations of the Act in suits brought by the United States, and it relied on the traditional principle that the power of equity courts to fashion decrees molded to the necessities of the individual case is employed especially flexibly when the public interest in the enforcement of a federal statute

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one market after the acquisition (Pet. App. A-20 to A-21). The court also found that the acquisition raised barriers to entry in markets which were already highly concentrated and accelerated a trend toward concentration (Pet. App. A-21).

is in question (Pet. App. B-10 to B-11). Following this Court's admonition that the federal courts must use their equity powers in antitrust cases to formulate relief that will restore competition, *International Salt Co.* v. *United States*, 332 U.S. 392, 400-401 (1947), the court concluded that where effective relief cannot be decreed without the seller's participation, the fact that sellers are not violators of Section 7 should not "force courts to close their eyes to the fact that the sellers are parties to an acquisition which is prohibited by law" (Pet. App. B-10). Emphasizing that no final relief had yet been formulated in the case before it, and that the question was presented largely in the abstract, the court concluded that "rescission is not without the pale of equitable discretion in appropriate circumstances" (*id.* at B-15).[4]

After the court of appeals issued its decision, the parties stipulated to the entry of a final judgment, which was entered by the district court on September 18, 1978 (Pet. App. D-1 to D-29). That order dissolved the preliminary injunction and dismissed petitioner A. M. Liquidating Company from the litigation (*id.* at D-29). It directed the purchasers to divest themselves of specified assets within one year (*id.* at D-7 to D-8). If the purchasers fail to do so, a trustee will be appointed by the court to undertake the task (*id.* at D-7 to D-15). In the event that the trustee is unable to complete the divestiture, he may

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[4] The court also found that the district court had not abused its discretion by entering the preliminary injunction in this case (Pet. App. B-18 to B-22).

petition the district court to hold hearings for the purpose of determining what further relief is appropriate; at such a hearing, petitioner Aqua Media, Ltd. "shall not assert that this Court is without power to order such further relief as to Aqua Media as may be just," and neither the government nor the purchaser will assert that the district court lacks power to order the trustee to convey back to Aqua Media such assets as will accomplish or complete the divestiture (*id.* at D-23 to D-24).

ARGUMENT

1. Petitioners contend (Pet. 15-23) that the federal courts may not order rescission as a remedy for violations of Section 7 of the Clayton Act, 15 U.S.C. 18. The court of appeals' decision on this question is one of first impression, and there is thus no conflict among the circuits. In the absence of such a conflict—indeed, in the absence of any indication that the question arises frequently—there is no reason for the Court to grant review.

a. Petitioners contend (Pet. 15-17) that the language of Section 7, which proscribes only "acquisition[s]," controls the scope of relief available under Section 15. Because the seller does not acquire assets, and therefore does not violate Section 7, petitioners urge, it is improper to find in Section 15 authority to require the seller to accept the assets back again as part of the rescission of a sale. Petitioners err, however, in portraying Section 15 as no more than the grant of judicial authority to enforce

the literal terms of Section 7. This Court has held that Section 15 empowers courts to use their equity powers to restore competition in affected markets. *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 326-327 (1961). This case therefore does not turn on arguments about what Section 7 does or does not forbid. It turns, instead, on equitable considerations that influence the shaping of relief once someone—if only the buyer—has violated Section 7 in a transaction in which petitioners, as the sellers, played an intimate role as facilitators of the unlawful acts.[5] After all, if petitioners had not sold their

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[5] Accordingly, the court of appeals' decision in this case does not conflict with *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967), which held that sellers are not guilty of violating Section 7 and are therefore not liable for treble damages. Nor do the other cases cited by petitioners (Pet. 11-13) support the proposition that equitable relief may never be granted against a seller under Section 15 of the Clayton Act where such relief is necessary to restore competition and is not inequitable. *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902 (9th Cir. 1968), which involved Section 3 of the Clayton Act, was also a treble damage action. In *Record Club of America, Inc.* v. *Capitol Records, Inc.*, 1971 Trade Cas. ¶ 73,694 (S.D.N.Y. 1971), the court dismissed the complaint for treble damages and injunctive relief against the sellers, finding that effective relief could be ordered without the seller's participation. In *United States* v. *Parker-Hannifin Corp.*, 1974-1 Trade Cas. ¶ 75,061 (C.D. Cal. 1973), the district court held that the seller had not violated Section 7 but was nevertheless a proper party defendant to an action brought by the United States under Section 15.

Similarly, the Federal Trade Commission held that, although a seller had not violated Section 7 of the Clayton Act, it might nevertheless be required to participate in the restoration of competition. Contrary to petitioner's assertion (Pet.

assets to their competitor, there never would have been a violation of Section 7. Petitioners are not bystanders.

Petitioners urge (Pet. 17-22), however, that the legislative history demonstrates that the purpose of Section 15 was to expand the geographic reach of the district court's powers, and that it was not intended to authorize the courts to order a seller to rescind a sales transaction.

Petitioner's extended discussion of the legislative history is beside the point, because it fails to demonstrate a clear legislative intent to limit the court's authority to formulate effective relief for clear violations of a statute. Once a case is properly before a court of equity, the court has full authority to formulate effective relief unless Congress clearly has restricted that authority.[6] The power to mold each decree to fit the necessities of the case is especially broad and flexible where the relief is designed to protect the public.[7] As this Court explained in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946):

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13), the FTC did not rely solely on its authority under the Federal Trade Commission Act. It relied as well on "the Commission's power as an equitable body to administer forms of relief that will fully effectuate the goals of the statute which it enforces." *Dean Foods Co.*, 70 F.T.C. 1146, 1293 (1966). (In *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966) this Court considered the propriety of the FTC's request for preliminary injunctive relief during the pendency of these administrative proceedings.)

[6] *E.g.*, *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960); *Clark* v. *Smith*, 38 U.S. (13 Pet.) 195 (1839).

[7] See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944).

> the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absense of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Neither the language nor the legislative history of Section 15 demonstrates any intent to limit the courts' equitable power to grant appropriate relief in cases brought pursuant to the Clayton Act, and the courts' authority thus extends to persons such as petitioners who played a substantial role in the unlawful act. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 171-178 (1977). As this Court stated in an action brought by the United States to enforce Section 7 of the Clayton Act, "[t]he key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. * * * [C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests." *United States* v. *E.I. duPont de Nemours & Co.*, *supra*, 366 U.S. at 326.

This does not mean, however, that relief routinely should require action by sellers. As the court of appeals indicated, the question whether rescission would be an appropriate remedy should be determined case by case. It emphasized that relief should involve the seller only where that is necessary and where the relief is not inequitable in light of the facts of the

case (Pet. App. B-16, B-18 to B-22).[8] As the court pointed out, in some cases there may be evidence that the seller knew that the acquisition was illegal or that it reaped a supranormal profit because of the anticompetitive nature of the transaction.[9] Or there

[8] The legislative history of the 1950 amendments to Section 7, which extended the statute's prohibition to acquisitions of assets, indicates that Congress recognized that prohibiting acquisitions would make it harder for sellers to find a purchaser, but it nevertheless concluded that the public interest in preventing anticompetitive acquisitions should take precedence over the owner's desire to sell. See *Hearings on H.R. 2734 Before a Subcomm. on Corporate Mergers and Acquisitions of the Senate Comm. on the Judiciary*, 81st Cong., 1st & 2d Sess. 134-135 (1949) (statement of Rep. Patman). Opponents of the legislation argued that it should not be enacted because it would hinder the owners of businesses who wished to sell, but their views were not accepted by Congress. See, *e.g.*, S. Rep. No. 1775, 81st Cong., 2d Sess. 21-23 (1950) (Sen. Donnell).

[9] If the acquisition is anticompetitive, it would make the assets worth more in the hands of the buyer (who can charge higher prices after the acquisition) than in the hands of the seller. The buyer and seller would often negotiate a price that gives to the seller part of the increase in value that is attributable to monopolizing. Rescission of the sale would cause the seller to lose the benefit of this increment, but there is no reason why sellers should be allowed to retain benefits made possible by the anticompetitive consequences of their transactions.

This discussion also illustrates one of the benefits of rescission as a remedy. The availability of rescission encourages sellers to examine the lawfulness of proposed sales and reduces an incentive that would otherwise exist to make unlawful sales. Moreover, despite petitioners' hyperbole, rescission would not compel an unwilling firm "to compete in a market from which it intentionally departed, and to invest its human and financial resources in a manner contrary to its independent best business judgment" (Pet. 23). After rescission

may be evidence that the seller, realizing the acquisition would probably be challenged, arranged to consummate the transaction before the government could learn of it. The consideration of the factors discussed by the court of appeals is well within the authority of a court of equity.[10]

b. Petitioners also make the closely related contention (Pet. 24-27) that sellers cannot properly be made parties to an action to enforce Section 7 of the Clayton Act once title to the sellers' assets has passed to its competitor. They urge that even though sellers may be joined as defendants when the United States brings suit to enjoin an unconsummated merger, Section 15 of the Clayton Act, which authorizes courts

petitioners could immediately resell the assets to any lawful purchaser. And petitioners would have far more incentive to preserve the value of the assets and to find such a purchaser than would the initial buyers. As monopolizers, the initial buyers usually seek to frustrate divestiture or, if divestiture is inevitable, to undermine the value of the assets as a source of future competition. That is why divestiture has sometimes proven to be an unsatisfactory remedy. See Elzinga, *The Antimerger Law: Pyrrhic Victories?*, 12 J.L. & Econ. 43 (1969); Pfunder, Plaine & Whittemore, *Compliance With Divestiture Orders Under Section 7 of the Clayton Act: An Analysis of the Relief Obtained*, 17 Antitrust Bull. 19 (1972).

[10] Cf. *Restatement of Restitution* § 168 (1937) (transferree of property who has notice of his transferor's wrongdoing may be sued for restitution by a defrauded party). Courts of equity traditionally have exercised the power to order rescission of illegal contracts, even at the behest of a party guilty of participation in the illegality, where that remedy will protect the public interest. See S. Symons, *Pomeroy's Equity Jurisprudence* § 941 (5th ed. 1941); 14 W. Jaeger, *Williston on Contracts* § 1631 (3d ed. 1972); Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 19 U. Pa. L. Rev. 261, 297-298 (1947).

to "prevent and restrain" violations of the Act, does not authorize relief against sellers once title to the assets has passed to the purchaser (Pet. 24-25).

This argument fails for the reasons discussed above. It is well established that Section 15 authorizes relief, such as divestiture of assets, to eliminate the effects of the illegal acquisition that has already occurred. *United States* v. *E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *United States* v. *E.I. du Pont de Nemours & Co., supra*, 366 U.S. at 317; *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972). Nothing in the language of Section 15 suggests that post-consummation relief is barred with respect to sellers.[11] Although this Court has never passed on the question,[12] the lower courts have con-

[11] The language of Section 15 of the Clayton Act differs significantly from that employed in Section 16, 15 U.S.C. 26, which permits private actions for injunctive relief against "threatened loss or damage by a violation of the antitrust laws." In *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975), the court concluded that because Section 16 permits injunctive relief only to restrain "threatened" loss or damage, it does not authorize post-acquisition structural relief. By contrast, Section 15 authorizes the district courts "to prevent and restrain violations of this Act."

[12] On appeal from the district court's original dismissal of the government's claim in *United States* v. *E.I. du Pont de Nemours & Co., supra*, 353 U.S. at 608, this Court held that:

> The motion of the appellees Christiana Securities Company and Delaware Realty and Investment Company for dismissal of the appeal as to them is denied. It seems appropriate that they be retained as parties pending determination by the District Court of the relief to be granted.

The propriety of relief against the sellers was left open by this Court's second opinion in that case. *United States* v. *E.I. du Pont de Nemours & Co., supra*, 366 U.S. at 334-335.

sistently held that the seller may properly be retained as a defendant in suits brought by the United States under Section 15 to enforce Section 7 of the Clayton Act. *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1261-1262 (C.D. Cal. 1973), aff'd mem., 418 U.S. 906 (1974); *United States* v. *Parker-Hannafin Corp.*, 1974-1 Trade Cas. ¶ 75,061 (C.D. Cal. 1973); *United States* v. *Pabst Brewing Co.*, 183 F. Supp. 220, 221 (E.D. Wisc. 1960);[13] *United States*

[13] Petitioners attempt to distinguish *United States* v. *Pabst Brewing Co., supra*, on the ground that the parties closed the acquisition in spite of their knowledge that the government intended to challenge the acquisition (Pet. 14). That, however, would not affect the court's power to retain the seller as a defendant. It concerns, at most, the appropriate scope of relief. But if, as petitioners' treatment of *Pabst* indicates, they acknowledge that seller culpability may make relief appropriate, then it should follow that relief is appropriate against petitioners. Evidence that the seller was formally notified of the government's intent to challenge a merger is not the only evidence of culpability which may be relevant. Certain facts in the instant case suggest that petitioners realized that the acquisition was illegal. The president of Aqua Media, Inc. personally estimated the market shares of the companies as 44% and 36% and considered the purchaser his company's "closest and most dangerous competitor" (Plaintiff's Exh. 20, Tr. of March 14, 1977 at 68-70). He admitted that the vice president of the purchasing firm told him early in the negotiations that Aqua Media's business would be worth more to these purchasers than to any other firm (Tr. of March 14, 1977 at 71). The transaction was consummated, without any

v. *E. I. du Pont de Nemours & Co.*, 177 F. Supp. 1, 10-12 (N.D. Ill. 1959), rev'd on other grounds, 366 U.S. 316 (1961).

2. We have argued above that the decision of the court of appeals is correct. Review by this Court is inappropriate for the additional reason that the question is not squarely presented. First, there has been no rescission order and may never be any. The consent order (see pages 5-6, *supra*) requires divestiture, not rescission; it simply leaves open the question what relief will be ordered if divestiture is not accomplished. The courts have held that rescission is a possible remedy, but it remains a contingency that may never occur in this case. There is no reason why this Court should assess the prospective legality of such a contingent possibility—especially since the question would be presented only in the abstract, apart from the considerations that might impel the use of rescission as a remedy in particular circumstances.

Second, the consent order itself saps the case of prospective importance. Petitioner A. M. Liquidating Company has been dismissed from the litigation. The preliminary injunction from which petitioners appealed has been dissolved. Petitioner Aqua Media,

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public notice, less than two weeks after the parties entered into the agreement (CT. 29, 32, 82, 83). ("CT." refers to the clerk's transcript.) Petitioner A. M. Liquidating Co. continued to distribute the proceeds of that sale to its stockholders after it was notified that a formal investigation had been undertaken by the Justice Department and that the government was considering filing suit (CT. 28, 35, 49, 50, 83, 84).

Ltd. has consented to the entry of an order directing it to take certain actions designed to assist the purchaser in divesting the assets (Pet. App. D-21 to D-23). The consent judgment preserves the possibility of further relief involving petitioner if divestiture of the assets proves impractical, and provides that petitioner will not assert that the district court lacks power to enter further relief (Pet. App. D-23). Petitioner Aqua Media, Ltd. has thus waived the right to contest any decree of rescission on the ground that such remedy is not permissible in suits brought by the government to enforce Section 7. We do not argue that the case is moot, for the district court has retained jurisdiction to supervise the process of restoring competition (*id.* at D-29). Aqua Media may yet be affected by a judicial order. But the legal issue raised in the petition is no longer a subject of controversy between the parties to the case.[14]

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[14] In our view, it is not necessary for this Court to determine whether the petition presents a live case or controversy, because the petition should be denied in any event. For the reasons stated at pages 4-8 of the Brief for the United States in Opposition filed in *Velsicol Chemical Corp.* v. *United States*, cert. denied, No. 77-900 (March 27, 1978), we submit that the Court should not exercise its discretion to vacate judgments because of mootness arising after the decision of the court of appeals, where the petition would not otherwise have been granted. We are sending petitioners a copy of our brief in *Velsicol*. The argument against vacating the judgment in the court of appeals is even stronger in this case than in *Velsicol*, because the possibility of mootness arises only because of petitioners' voluntary waiver of their right to contest the entry of the final judgment order.

CONCLUSION

The petition for a writ of certiorari and the motion for leave to file a petition for a writ of common law certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

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